United Nations A/CN.9/963

General Assembly

Distr.: General
30 October 2018

Original: English

United Nations Commission on International Trade Law
Fifty-second session
Vienna, 8–26 July 2019

Report of Working Group I (MSMEs) on the work of its thirty-first session (Vienna, 8–12 October 2018)

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I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take,[4] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in working paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in working paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.97, paras. 5 to 20.

[3] See Report of Working Group I (MSMEs) on the work of its twenty-second session A/CN.9/800, paras. 22 to 31, 39 to 46 and 51 to 64.

[4] Ibid., paras. 32 to 38.

[5] Ibid., paras. 47 to 50.

[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.[8]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the latter, following a presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of working papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.[9] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding-up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[10] The Working Group agreed to continue discussion of the draft text in working paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,[11] the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and Add.1).[12] In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and the recommendations document (A/CN.9/WG.I/WP.96 and Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.[13] In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.[14] The Working Group also decided[15] that it would devote its twenty-seventh session to deliberations on a draft legislative guide on a simplified business entity, and its

[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 340.

[9] See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.

[10] Ibid., paras. 76 to 96.

[11] See Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 23 to 47.

[12] Ibid., paras. 48 to 50.

[13] Ibid., paras. 56 to 85 and 51.

[14] Ibid., paras. 86 to 87.

[15] See Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, para. 90.

twenty-eighth session (New York, 1 to 9 May 2017) to consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.[16]

10. At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group continued its deliberations focusing on the draft legislative guide on a simplified business entity. As decided at its twenty-sixth session,[17] the Working Group left consideration of the draft legislative guide on key principles of a business registry for the first week of its twenty-eighth session (New York, 1 to 9 May 2017). At its twenty-seventh session, the Working Group considered the issues outlined in working papers A/CN.9/WG.I/WP.99 and Add.1 on an UNCITRAL limited liability organization (UNLLO), beginning with section A on general provisions (draft recommendations 1 to 6), section B on the formation of an UNLLO (draft recommendations 7 to 10), and section C on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.94 of the French legislative approach known as an "Entrepreneur with Limited Liability" (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

11. At its twenty-eighth session (New York, 1 to 9 May 2017), the Working Group considered both topics currently on its agenda. Those deliberations commenced with a review of the entire draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101), save for the introductory section and draft recommendation 9 (Core functions of a business registry) and its attendant commentary, to which the Working Group agreed to revert at a future session. With respect to its deliberations regarding the creation of a simplified business entity (A/CN.9/WG.I/WP.99 and Add.1), the Working Group continued the work begun at its twenty-seventh session, and considered the recommendations (and related commentary) of the draft legislative guide on an UNLLO in sections D, E and F.

12. At its fiftieth session (Vienna, 3 to 21 July 2017), the Commission commended the Working Group for the progress it had made in its two areas of work on the preparation of a draft legislative guide on an UNCITRAL limited liability organization and a draft legislative guide on key principles of a business registry. In particular, the Commission welcomed the potential completion of the latter guide on business registration for possible adoption at the fifty-first session of the Commission (New York, 25 June to 13 July 2018).[18]

13. At its twenty-ninth session (Vienna, 16 to 20 October 2017), the Working Group continued its deliberations. As decided at its twenty-eighth session,[19] the Working Group spent the entire twenty-ninth session reviewing a draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.106) save for the introductory section and part of the annex (paras. 1 to 6 and 8 to 16 and recommendations 1 and 3/annex) to which the Working Group agreed to revert at a future session.

14. At its thirtieth session (New York, 12 to 16 March 2018), Working Group I conducted a third review of the draft legislative guide on key principles of a business

[16] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 224.

[17] See supra footnote 15.

[18] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 235.

[19] See Report of Working Group I (MSMEs) on the work of its twenty-eighth session, A/CN.9/900, para. 169.

registry on the basis of working paper A/CN.9/WG.I/WP.109, including the introductory paragraphs. The Working Group also reviewed the overarching document setting out the context for its work on MSMEs included in A/CN.9/WG.I/WP.110. After discussion, the Working Group agreed to transmit both texts to the Commission for consideration and potential adoption at its fifty-first session. The Working Group also decided[20] that it would devote the deliberations at its thirty-first session (Vienna, 8 to 12 October 2018) to consideration of the draft legislative guide on an UNLLO found in documents A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

15. At its fifty-first session, in 2018, the Commission commended the Working Group on the work it had done on the preparation of a draft legislative guide on key principles of a business registry as it appeared in document A/CN.9/940 and adopted the guide with a few revisions.[21] The Commission also heard a progress report of the work of Working Group I and noted that at its thirty-first session the Working Group would resume its consideration of the draft legislative guide on an UNLLO, with a view to completing the first reading of the draft text.

II. Organization of the session

16. Working Group I, which was composed of all States Members of the Commission, held its thirty-first session in Vienna from 8 to 12 October 2018. The session was attended by representatives of the following States Members of the Working Group: Argentina, Armenia, Belarus, Brazil, Burundi, Canada, Chile, China, Côte d'Ivoire, Czechia, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, United States of America and Venezuela (Bolivarian Republic of).

17. The session was attended by observers from the following States: Benin, Bolivia (Plurinational State of), Burkina Faso, Costa Rica, Croatia, Dominican Republic, Finland, Lao People's Democratic Republic, Latvia, Malta, Myanmar, Nepal, Netherlands, Qatar and Slovakia.

18. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank Group (WB);

(b) *Intergovernmental organizations*: Commonwealth Secretariat, Cooperation Council for the Arab States of the Gulf (GCC); Eurasian Economic Commission/Eurasian Economic Union (EEC/EEU);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA); Bankers Association for Finance and Trade (BAFT); Center for International Legal Studies (CILS); Conseils des Notariats de l'Union Européenne (CNUE); International Union of Notaries (UINL); Latin American Group of Lawyers for International Trade Law (GRULACI); Law Association for Asia and the Pacific (LAWASIA); Moot Alumni Association (MAA); and National Law Center for Inter-American Free Trade (NLCIFT).

[20] See Report of Working Group I (MSMEs) on the work of its thirtieth session, A/CN.9/933, para. 114.

[21] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), paras. 71 to 111.

19. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Saboré Kourouma Guiro (Côte d'Ivoire)

20. In addition to documents presented at its previous sessions, the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.111);

(b) Note by the Secretariat on a draft legislative guide on an UNCITRAL Limited Liability Organization (A/CN.9/WG.I/WP.112).

21. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

22. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular, on a draft legislative guide on an UNCITRAL Limited Liability Organization (UNLLO) (A/CN.9/WG.I/WP.112). The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises: draft legislative guide on an UNCITRAL Limited Liability Organization (UNLLO)

A. Presentation of A/CN.9/WG.I/WP.112 and introductory observations

23. The Working Group heard a short introduction on the session and working paper A/CN.9/WG.I/WP.112 that consolidated previous working papers A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1. The Working Group was reminded that it had devoted its twenty-ninth and thirtieth sessions to finalizing the draft legislative guide on Key Principles of a Business Registry, adopted by the Commission at its fifty-first session in July 2018, and that to date the Working Group had not completed a review of the entire draft legislative guide on an UNLLO. It was noted that the Working Group had discussed sections A to F of the draft legislative guide (draft recommendations 1 to 20), save for recommendations 1 and 10, which the Working Group had agreed to revert to at a later stage.

24. The Working Group was further reminded that working paper A/CN.9/WG.I/WP.112 took a "think small first" approach, focusing on the needs of MSMEs and that the recommendations and the attendant commentary were drafted from the perspective of micro and small businesses. It was also stressed that the principle of freedom of contract permeated the entire draft legislative guide although the text included mandatory provisions that could not be contracted out of by the UNLLO members and default rules that were intended to fill any gaps in the agreement of the UNLLO members. It was further emphasized that the draft

legislative guide aimed to create a free-standing legal regime and that while the guide was based on the experience and best practices of States, including several States in the Working Group, in developing simplified business entities, it established an independent legislative approach delinked from States' existing corporate laws. Finally, the Working Group was reminded of some of the main features of an UNLLO, such as:

(a) An UNLLO should be granted legal personality and its members should enjoy limited liability for the obligations of the UNLLO;

(b) No minimum capital requirement should be required for the establishment of an UNLLO; and

(c) An UNLLO could engage in any lawful business or commercial activity.

B. Formation of the UNLLO

25. The Working Group considered whether it should continue its work of the twenty-eighth session and review those sections of the draft legislative guide that had not been previously considered (sections G to L) or whether it would be preferable to review the entire guide beginning with section A given that it was reverting to consideration of the text on the UNLLO after a long interval. After discussion, the Working Group agreed to commence its deliberations from section B on formation of the UNLLO (draft recommendations 7 to 9 and their attendant commentary).

Paragraphs 53 to 55 and recommendation 7

26. It was noted that some States may have strong concerns with legal persons being members of an UNLLO since the structure of the UNLLO was devised to cater for the needs of small entrepreneurs operating individual businesses and legal persons could misuse the UNLLO. For this reason, it was suggested that draft recommendation 7 should include reference to the fact that a State could prevent a legal person from being a member of an UNLLO as indicated in paragraph 55 of the draft legislative guide. It was also observed, however, that permitting a legal person to become a member of an UNLLO would allow for further development of the UNLLO and a suggestion was made to elaborate on safeguards that a State could implement.

27. After discussion, the Working Group agreed that draft recommendation 7 should better address potential concerns raised by granting UNLLO membership to a legal person. In this respect, there was also agreement that the second part of the recommendation be drafted along the following lines: "States should decide whether only natural or also legal persons are permitted to be members of an UNLLO". It was further agreed that the recommendation be divided into two, so that the issue of the number of members an UNLLO should have at its formation and that of the type of membership of an UNLLO be addressed separately.

28. It was agreed that paragraph 55 of the draft legislative guide be further expanded to discuss the advantages and drawbacks of UNLLO membership being granted to a legal person. In this specific context, it was further observed that the commentary should address the following instances: (a) membership of an UNLLO granted to a legal person; (b) membership of an UNLLO not granted to a legal person; and (c) membership of the UNLLO granted to a legal person only in the case of a multi-member UNLLO. There was general agreement on that proposal.

29. A proposal that a new recommendation on whether a legal person could be the sole member of an UNLLO was made, but it was noted that the new drafting of paragraph 55 may address that concern and that the Working Group might revert to that issue at a later stage. It was also noted that a proposal to strike the final sentence of paragraph 53 would need to be raised after the Working Group had considered section G and draft recommendation 21 on transfer of rights, and a proposal to remove

the phrase "until its dissolution" in draft recommendation 7 should likewise be considered at a later stage.

30. As a matter of drafting, it was agreed to eliminate "capable of making an investment" from the text of paragraph 54 and modify the final clause along the lines of "which should include any entity with a legal personality."

Paragraphs 56 to 58 and recommendation 8

31. It was noted that draft recommendation 8 was not intended to address the legal personality of the UNLLO, but rather to address the moment at which the UNLLO came into existence. It was also noted that in some legal systems, a period of time may exist between filing an application for registration and the time at which the certificate of registration of the business was issued. Therefore, it was suggested to clarify whether the draft legislative guide was referring to the registration or the filing. After discussion, the Working Group agreed that the draft recommendation, rather than addressing the matter of registration procedures, should be drafted along the lines of "The law should provide that the UNLLO is formed when it is registered" and that the commentary should be modified accordingly.

32. It was agreed that the discussion of registration as a matter of State law should be drafted neutrally and should include references to the Legislative Guide on Key Principles of a Business Registry, when appropriate. The Working Group also agreed to insert the word "its" before "legal personality" in paragraph 56.

Paragraphs 59 to 63 and recommendation 9

33. The Working Group agreed to remove reference to "in most instances" from paragraph 60 and the word "valid" from draft recommendation 9. It was also agreed to specify the name of each "member-manager" rather than each "member" in paragraph 61, as there could be instances in which the UNLLO would be member-managed but not all members would be designated managers.

34. With regard to paragraph 63, it was felt that each manager should not have the right to make any amendment to a formation document without the agreement of other managers, and that the paragraph should clarify that each manager should merely have the authority to report or notify the registry of that change. It was also noted that the formation document, as defined in paragraph 27, could not be amended.

35. It was felt that the requirement for the name of each manager in draft recommendation 9(d) could be elaborated to enable more precise identification of the manager. Suggestions were made to require additional pieces of information on the manager, such as an identification card number. It was recalled that draft recommendation 9 had been deliberated at previous Working Group sessions and that suggestions had been considered about including additional mandatory information, such as the business purpose, the capital of the UNLLO and the names of the founding members, but that the Working Group had decided on the four items listed in the recommendation as drafted.

36. While recognizing that the intention of the recommendation was to limit the minimum information necessary for the establishment and operation of the UNLLO, and that additional requirements could create an unnecessary burden for MSMEs, views were expressed that that purpose would need to be balanced against other State policies, such as transparency and accountability. In particular, a concern was raised about the word "only" in the chapeau of draft recommendation 9, which could limit the right of States to solicit additional information from the UNLLO. Views were expressed that the word "only" should be retained in light of the policy goals of the recommendation, that it should be stricken to leave States with the option of including additional information if desired, or that it should be replaced by "at least" or "including". It was also suggested to redraft the text of draft recommendation 9 so that it explicitly referenced the policy goal of keeping required information to a minimum.

37. After discussion, it was agreed to redraft the chapeau of the recommendation along the following lines: "The law should keep information required for the formation of the UNLLO at a minimum. The information required shall include:". Finally, it was noted that the reference to "minimum information" in paragraphs 59 and 60 would need to be consistent with the text of the draft recommendation.

38. A question was raised about the need for draft recommendation 9 and its attendant commentary given the recent adoption of the UNCITRAL Legislative Guide on Key Principles of a Business Registry ("Business Registry Guide") and the requirement of the UNLLO members to register the UNLLO. It was generally felt that the alignment of the language in the two guides would be valuable because they could be consulted independently. The need for consistency between this draft legislative guide and the Business Registry Guide was stressed, and a proposal was made to rephrase draft recommendation 9(b) to reflect the drafting approach adopted in recommendation 21 of the Business Registry Guide, so that it would read: "the address at which the UNLLO can be deemed to receive correspondence or, in cases where the UNLLO does not have a standard form address, the precise description of the geographical location of the UNLLO". At the same time, it was felt that the audience for the two guides would differ and some flexibility would be needed in the use of terminology. It was also suggested that draft recommendation 9(d) could be articulated differently to better address the fact that States could have different identification systems for legal and natural persons, and a proposal to replace "name" with "identity" was agreed by the Working Group.

39. It was noted that the information required under draft recommendation 9(c) related to the type of management of the UNLLO and it was questioned whether this information was relevant in a recommendation listing requirements for the formation document. It was pointed out that the type of management of an UNLLO may evolve over time and that the mention of such information in the formation document may not reflect the reality after a certain time.

40. It was further suggested to amend draft recommendation 9(c) to have it refer to the percentage of ownership or to the person being the legal representative of the UNLLO. While it was generally felt that many of the proposals of additional requirements could assist in protecting third parties, it was recalled that the purpose of the current work was to address the need for a legal framework to help micro businesses operate in the formal sector and that requirements for formation should be kept to a minimum. In response to a question raised as to the information that should be made public, it was also suggested that the commentary to draft recommendation 9 be amended to address the issue of publication of information. The Working Group agreed that the question of what to require should be considered separately from the question of what information should be made public.

41. Recalling the agreement to modify the chapeau, the Working Group agreed that additional requirements could be added by the enacting States depending on their specific needs and that the commentary could be supplemented by examples of those requirements. After discussion, it was therefore agreed that draft recommendation 9(c) would be deleted, and that the word "name" in draft recommendation 9(d) would be replaced by "identity". The Working Group also reverted to its previous discussion on paragraph 63 (see para. 34 above) and decided to delete the paragraph from the commentary. In addition, it was agreed to insert into the commentary a discussion of minimum information that States may wish to require, such as the percentage of ownership (see, however, the discussion of the Working Group on "percentage of the ownership" in paras. 77 and 78 below), a list of founding members, duty of representation and limitations on the powers of managers to bind the UNLLO. Some delegations also suggested to add reference to "a purpose clause".

C. Organization of the UNLLO

Paragraphs 67 to 70 and recommendation 11

42. It was noted that draft recommendation 11 (as modified by the Working Group at its twenty-eighth session) only provided a default rule on managing an UNLLO with respect only to single-member UNLLOs and a suggestion was made that a default rule for a multi-member UNLLO would also be valuable. In this regard, there was support for a proposal that the second sentence of the recommendation should be redrafted along the lines of former draft recommendation 12 in document A/CN.9/WG.I/WP.99/Add.1 without using the expression "member-managed". It was also agreed that the revised recommendation 11 should account for a situation in which UNLLO members opted for designating an external manager instead of managing the business themselves.

43. It was further suggested that the phrase "unless otherwise agreed" used both in current recommendation 11 and former recommendation 12 (as drafted in A/CN.9/WG.I/WP.99/Add.1) be replaced with text along the lines of "unless otherwise indicated in the members' agreement" since "members' agreement" was a defined term in the draft legislative guide. With regard to the term "members' agreement", several delegations noted that the meaning would need to be further clarified as used throughout the draft legislative guide, as well as in the definition provided in the terminology section. There was agreement in the Working Group to revert to this discussion when considering the terminology section. Secondly, a concern was expressed that reference to appointing an external manager in the members' agreement was not consistent with the procedure proposed in draft recommendation 15 that provided that a manager's election and removal could be made by a majority decision of the UNLLO members. It was however clarified that draft recommendation 11 was meant to express the broad concept that an UNLLO might be managed by an external manager or by some, but not all, of the members, while draft recommendation 15 provided a rule for the appointment and removal of a manager during the life cycle of an UNLLO and specified the required members' votes. It was suggested to include a cross reference to draft recommendation 15 in the commentary to draft recommendation 11.

44. After discussion, the Working Group agreed to include in the draft recommendation text along the following lines: "The law should provide that the UNLLO is managed by all members unless otherwise indicated in the members' agreement. Members of the UNLLO may agree in their members' agreement to appoint one or more non-member managers".

45. In that regard, it was noted that the phrase "members' agreement" as generally agreed upon in draft recommendation 11 should contain brackets, as the Working Group had not reached consensus on the use of "members' agreement" or "formation document". If "members' agreement" was to be used, the Working Group would need to consider whether such an agreement would need to be recorded. The Working Group agreed it would review the definition of "members' agreement" more generally.

46. A proposal to move draft recommendation 11 to section D of the guide (Management by managers or members) and to replace it with a more general rule in Section C (Organization of the UNLLO) on the need for an UNLLO to have at least one manager was also heard by the Working Group.

47. Finally, a question was raised whether legal persons that were members of an UNLLO could also be a manager of the UNLLO. It was agreed that this decision would need to be addressed by domestic legislation, as well as any other legal requirements (such as age or legal capacity) to be met in order to be a manager. The Working Group supported the approach of addressing this issue in the commentary to draft recommendation 11 and to possibly discuss the issue again at a future session.

Paragraphs 71 to 73 and recommendation 12

48. The Working Group began its deliberations on draft recommendation 12 by considering a number of issues that would affect the deliberations of other draft recommendations. While it was noted that draft recommendation 12 addressed two different types of management, the first by members and the second by managers, it was suggested that it should rather focus on the decision-making process for decisions that needed to be made by members in their capacity as members. A question was raised as to how voting rights should be apportioned among members of the UNLLO.

49. It was first observed that the language of draft recommendation 12(b) would not apply to manager-managed UNLLOs as a non-member manager would make day-to-day decisions without the involvement of the members. It was suggested that draft recommendation 12 should focus exclusively on member-managed businesses, the definition of which should specify that it only referred to UNLLOs in which all members were managers. It was thought that such an UNLLO would benefit from default rules on decision-making processes. A further suggestion was that information on manager-managed UNLLOs could be dealt with separately, possibly in another section of the guide.

50. Secondly, it was noted that different types of management decisions would require varying voting structures, for example some decisions would only require a simple majority, while others might require a qualified majority. It was then pointed out that the differentiation between two types of decisions (the decision taken in the ordinary course of business and the decisions taken outside the ordinary course of business) may add ambiguity to the text, which would need to be explained in greater detail. It was also noted that the Working Group would need to define qualified majority.

51. Similarly, it was noted that the draft guide would need to address how to define a majority more generally. Suggestions to distribute voting rights in proportion to the percentage of ownership received some support. Others were of the view that voting rights based upon proportional share of ownership may not be practical and that there would be multiple ways to define ownership. Consequently, a suggestion for the default rule to grant equal voting rights to all members also received some support.

52. After discussion, it was felt that the decision reached by the Working Group on draft recommendation 12 would affect the deliberation on other recommendations in the draft guide, and the Secretariat was requested to provide a redrafted recommendation 12 for further discussion by the Working Group.

53. The Working Group continued its discussion of draft recommendation 12 and heard a number of proposals (see the annex to the report) from delegations in addition to that of the Secretariat on how to modify that recommendation.

54. Many views were expressed in relation to the complexity of the recommendation for the end users of the draft legislative guide. The main concern raised was that the use of specific terminology referring to corporate law concepts could be confusing for potential members of an UNLLO. In response, it was said that precise definitions of several concepts could be added to the draft legislative guide.

55. In that context, it was recalled that the general approach of the Working Group had been for simplicity and the promotion of freedom of contract and that providing complex rules would not serve that purpose. On the other hand, the concern was expressed that the draft legislative guide should not be so simple as to lose legal certainty.

56. To address the concerns, it was suggested that the draft guide provided only guidance on a legal framework for a simple and flexible model of an UNLLO as a completely new business form catering to the needs of SMEs. It was noted however that an UNLLO which started as a very small and basic entity could evolve into a more elaborate structure. As it was felt that some greater level of complexity would

be needed in the guide to assist such businesses, it was suggested that guidance should relate not only to the legal framework for its initial form, but also to the steps for its members to follow when they would want to grow or evolve.

57. While some views expressed were that this transition of the UNLLO needed to be dealt with in the guide, other views were that the UNLLO would have the opportunity to take on another recognized legal business form under applicable domestic law.

58. It was nevertheless pointed out that many members may prefer to retain the UNLLO form so as not to have to comply with more burdensome or expensive requirements under different corporate structures. In response, it was said that the draft guide could perhaps provide for model forms that catered to the different options available to the UNLLO at its initial stage or when the members would want to modify that structure. It was recalled that similar suggestions had been made at previous sessions of the Working Group.

59. While acknowledging the need for guidance on a simple form and for assistance through its possible evolution, it was observed that the overall framework would need to be sound and it was suggested to address the concerns using simple default rules.

60. Returning to the proposals before the Working Group (see the annex to the report), the concept of voting rights was raised in a variety of contexts, including the question of whether the default rules should be determined by headcount or in proportion to ownership. A view was expressed that the term "voting" itself could cause confusion, as in practice voting would not be likely to occur, and another term such as "decision-making" was suggested to be included in its place. Alternatively, a suggestion was made to include a separate recommendation on voting rights to provide greater guidance given the concerns raised. However, there was a prevailing view that the proposals considered by the Working Group had presented a similar approach to the topic of voting.

61. There was consensus that certain categories of decision-making should be through a simple majority vote. There was also wide support for the suggestion to expressly identify in the text of the draft recommendation the types of issues that would require a qualified majority or unanimity. On the question of whether the default rule should specify either qualified majority or unanimity, views were expressed as to the positive and negative effects of each, including the possibility of abuse of majority power and abuse of veto power. It was also stated that if qualified majority were used in the default rules, then the Working Group should consider specifically how to address amendments to the members' agreement.

62. It was noted that much of the content in the proposals considered by the Working Group (see annex to the report) aligned in substantive ways, but that a primary difference was in respect to the authority of managers when not all members were managing the UNLLO.

63. One approach taken was to prioritize the rights of the members of the UNLLO and to limit the responsibility of the managers to matters that were not assigned for decision by members by law or by the members' agreement. An example of a law was given that a State might, for example, have rules of accounting that would need the approval of all members. That approach treated non-member managers and member managers similarly while keeping separate the voting rights of the UNLLO members. It was said that under this approach caution should be given to possible gaps or overlaps between the decisions within the authority of the UNLLO members and those within the authority of the manager.

64. Under the second approach, the control rights of the members were provided but the responsibility and the authority of the managers over the day-to-day operations of the UNLLO were emphasized. In this regard, a concern was raised about the ability of a manager to act outside his or her responsibilities, and it was suggested to clarify that this section needed to focus on internal decision-making authority and not on external representation.

65. After discussion, the Working Group agreed that further consideration of draft recommendation 12 would be necessary.

66. An additional drafting proposal (see proposal H in the annex to the report) was presented in an effort to combine both approaches considered by the Working Group and to address the concerns raised during the deliberations. Regarding this new proposal, it was said that the language would need to be adjusted in several instances. It was stressed as an example that the expression "assigned by law" may not be clear.

67. Some concern was again expressed as to the terminology referring to corporate law and it was suggested to refer to "approval" or "consent" instead of "vote". It was also noted that the proposal used the expressions "decisions made by members" and "differences resolved by managers" and that consistency should be used. Finally, it was said that confusion could arise from the expression "decision reserved for members".

68. Although this new proposal was not taken up as drafted, it was generally felt that there was consensus in the Working Group that draft recommendation 12 should contain a default rule providing for simple majority and that qualified majority would be required for the identified restricted number of decisions. The instances in which unanimity would be preferable could still be considered at a later stage. It was added that qualified majority would also need to be defined and therefore the terms "qualified majority" and "members' agreement" in the next version of draft recommendation 12 should be placed in square brackets. It was agreed that all issues regarding drafting and identified inconsistencies or ambiguities should be resolved by the Secretariat, which would also have to propose a clear definition for the word "manager" for the draft guide.

69. An observation regarding the way to proceed for the next round of deliberation was that it would be necessary to know which of those proposals would be the basis for discussion. In response, it was said that since no consensus had been reached on one or the other, all proposals would be put in the record for easier reference at a later stage (see the annex to the report). The Working Group agreed to reconsider the additional drafting proposal (see para. 66 above) at its next session. Although the Working Group had not reviewed draft recommendation 14 in document A/CN.9/WG.I/WP.112, it requested the Secretariat to prepare an alternative drafting of that recommendation based on the proposals that had been made (see paras. 63 to 66 above) which also included modifications to draft recommendation 14.

D. Management by managers or members

Paragraphs 82 and 83 and recommendation 15

70. The Working Group discussed draft recommendation 15 and its attendant commentary.

71. It was said that the draft recommendation should apply only to a manager-managed UNLLO and that it should be clarified that the recommendation did not apply to a member-managed UNLLO when all members were managers. Some delegations expressed a preference for the current drafting of the recommendation as it was noted that the UNLLO members could be appointed as managers when not all members were managers. It was further noted that the draft recommendation would be applicable in those situations in which the default rule in draft recommendation 11 did not apply. In that regard, a question was raised whether removal of a manager who was also an UNLLO member would affect its contractual rights in the UNLLO. Some delegations were of the view that removal of a member-manager (when all members were managers) would require a decision by a qualified majority of the members, as would modification of the members' agreement, since such a decision would affect the structure of the UNLLO. It was also noted that the issue was not discussed in the draft guide and the matter of expulsion of a member could be considered in the context

of draft recommendation 12. Another view was expressed that simple majority was sufficient to remove a manager who was also a member.

72. A comment was reiterated that the rules in draft recommendations 11 and 15 should not be placed in different sections, but rather combined in the same section dealing with (a) election or removal of a member who is a manager when not all members were managers; and (b) election or removal of an external manager. It was suggested that since certain recommendations only applied when an UNLLO was managed by all of its members, it would be appropriate for the legislative guide to be structured around a multi-track approach moving from an UNLLO managed only by all of its members to more complex forms. Different opinions were expressed in this regard. One possible approach would be to separate the two "branches of the tree" and have the recommendations for the UNLLO managed only by all of its members in one section of the draft legislative guide and the recommendations on the more elaborate UNLLO in a different section. In that option, it would be necessary to provide an introductory text to the draft guide which would clarify what rules applied solely to the UNLLO managed only by all of its members. One view was expressed that this approach might result in duplication of recommendations.

73. Another view was to examine each recommendation by keeping in mind, for each recommendation, whether it was applicable to UNLLOs managed only by all members, or to UNLLOs managed by an appointed manager or both. It was thought that that approach would result in a global overview of the draft guide before making a determination about how to proceed.

74. After discussion, it was agreed that further consideration of the scope of the recommendation and its application was needed at future sessions of the Working Group.

75. As a matter of drafting the following observations were noted:

(a) In paragraph 82, the term "agreement" could be replaced with "rules";

(b) In paragraph 83, the term "would" between "members" and "be required" could be replaced with "could"; and

(c) The text of draft recommendation 15 should read "appointed or removed".

E. Percentage of the ownership of the UNLLO and contribution by members

Paragraphs 84 to 90 and recommendations 16 and 17

76. It was noted that recommendation 16 as currently drafted provided a default rule on equal share of ownership of the UNLLO among members. It was agreed to retain the default rule in principle, but to clarify the text of the recommendation. In that regard, it was felt that draft recommendation 16(a) was not reflected in the commentary and did not provide meaningful guidance to enacting States. Therefore, there was support in the Working Group to eliminate the subparagraph.

77. It was stated that the term "ownership" in the draft recommendation had economic implications. A concern was raised that it might be understood to apply only to the assets of the UNLLO, when the right to participate was the impetus behind the recommendation. In that context, several alternative suggestions were made, including membership, stake, share, value, and interest. It was recalled that the Working Group had previously considered the use of such terms (para. 25, A/CN.9/866). A view was expressed that the term "share" would give the impression of requiring a corporate-like structure. Nonetheless, it was agreed that "share," when used in the singular as a noun, should be introduced into the draft legislative guide as a substitute for ownership and that the term should be defined and used neutrally.

78. After discussion, it was agreed to modify the text of draft recommendation 16 along the following lines: "Members have an equal share in the UNLLO unless they

agree otherwise in the members' agreement." Given the scope of the proposed draft recommendation, it was felt that the discussion of classes of shares in paragraph 85 would be unnecessarily complicated for the commentary and the Working Group agreed to delete it.

79. With regards to capital structure, it was stated that the more accurate term in paragraph 87 would be "legal capital". It was questioned again whether members should be required to make a contribution and it was recalled that contributions could be made in cash or kind or performance of a service. Examples were given of MSMEs where at least one member would not make a contribution at the outset, and a suggestion to insert into paragraph 86 a reference that it was not necessary for some members to make contributions was taken up by the Working Group. Moreover, given the decision that the UNLLO should not be required to have legal capital upon registration, contributions by members would not be necessary. Consequently, the Working Group agreed to delete the rest of paragraph 87.

80. Further, regarding contributions, it was stated that the word "amount" in paragraph 88 ought to be "valuation", so as to not give the impression that contributions must be in cash. The Working Group agreed to move paragraph 89 immediately after paragraph 86 to better illustrate non-monetary contributions. It was also observed that there would be some difficulty for members to value contributions not made in cash and a suggestion was made to have a practical rule on non-monetary valuations in the draft legislative guide. A concern about implied continuing obligations was also noted, particularly vis-à-vis third parties.

81. A question regarding valuation of contributions in relation to shares was raised. While it was noted that the Working Group had chosen the principle of equality as a default for a member's share in draft recommendation 16, views were expressed that draft recommendation 17 should include a sentence that a member's share in the UNLLO should correspond to its percentage of contribution to the UNLLO and text was suggested along the following lines: "If members identify the respective values of their contributions in the members' agreement, each member's share in the UNLLO will be determined in accordance with those respective values."

82. Others were of the view that contributions need not be linked to shares and it would not be necessary to treat the two with equivalence. Views were also expressed that draft recommendation 16 should remain the default rule and that a caveat in draft recommendation 17 could be complicated for States to implement. In response, it was suggested that draft recommendation 17 may no longer be necessary, but it was stated that the financial liability discussed in paragraph 42 was usually limited to the value of the member's contribution to the UNLLO, so a recommendation on contributions would remain a valuable part of the draft legislative guide.

83. In respect to the link between contributions and shares, it was agreed that the second clause of draft recommendation 17, which read "when deciding the members' respective percentage of ownership of the UNLLO", should be eliminated. There was also some support to delete the final sentence of draft recommendation 17 or to change "should be equivalent" to something like "should be deemed equivalent."

84. After discussion, the Working Group agreed that further consideration of draft recommendation 17 would be necessary.

85. The Working Group thus considered new proposals on draft recommendations 16 and 17 that were based on the prior deliberations. It was stated that a share based on a member's contribution would better reflect the expectations of the members of the UNLLO. In that respect, it was noted that agreement between the members as to the value of their contributions would be necessary. Based upon that, there was a prevailing view that when the value of the contribution was agreed, the default rule should establish the share based upon the contribution.

86. A view was expressed that contributions or a decision on the value of the contributions to be made would need to be formalized prior to registration. It was noted that this would preclude service as a form of contribution and that timing could

be added to the description of items that members could agree upon. A concern relating to the form of the members' agreement and how it could be amended was again noted.

87. When contributions were not made, or when the value of the contributions was not established, the Working Group agreed that another default rule would be necessary and agreed to apply the principle of equality that had formed the basis of draft recommendation 16.

88. It was noted that there were two default rules relating to a member's share, and it was agreed to combine them into one draft recommendation, along the following lines: "The law should provide that the members of the UNLLO are permitted to agree upon contributions, if any, made to the UNLLO, including the amount, type, timing and value of such contributions. In the absence of such agreement, contributions that are made to the UNLLO should be deemed equal for all members. Unless otherwise agreed in the members' agreement, members' share in the UNLLO shall be decided in accordance with the agreed value of their contributions. In the absence of any reference to contributions, members shall have an equal share in the UNLLO unless they agreed otherwise in the members' agreement".

89. Views were expressed that that recommendation did not take into account and did not apply to single member UNLLOs. After some discussion, it was agreed that provisions would be made where necessary in the draft guide to account for single member UNLLOs. A view was also expressed that the term "agreed value" would not include the default rule set out in the combined version of draft recommendations 16 and 17 (see para. 88 above), that in the absence of an agreement among the members, contributions made to the UNLLO should be deemed equal for all members, and that in the drafting process, the term "agreed value" should be reconsidered.

V. Next session of the Working Group

90. The Working Group recalled that its thirty-second session was scheduled to be held from 25 to 29 March 2019 in New York. The Working Group considered how to approach the session, given that part of it would be dedicated to a colloquium on contractual networks and other legal tools that achieved goals similar to contractual networks. It was agreed that the next session would consider the core concepts underlying the draft legislative guide, especially the terminology section. The Secretariat was requested to make amendments to the recommendations and the commentary that the Working Group had discussed at its current session and to thoroughly footnote the revised text to reflect discussions and decisions of the current session, in order to assist the Working Group in its consideration of the draft legislative guide. The Secretariat was given the flexibility to suggest changes to recommendations that would likely be affected by decisions taken by the Working Group at its current session. The Secretariat was also requested to identify portions of the draft guide where a discussion on either a single-member UNLLO or more sophisticated forms of an UNLLO could be advisable.

Annex

Proposals discussed by the Working Group on possible redrafting of recommendations 12 and 14

PROPOSAL A	PROPOSAL B
Recommendation 12	**Recommendation 12**
The law should provide that, unless otherwise indicated in the members' agreement: (a) The members of an UNLLO shall have voting rights in proportion to their respective percentage of ownership of the UNLLO; (b) A [simple] majority of votes, in proportion to the respective percentage of ownership of the UNLLO, shall be required for decisions on the operation of an UNLLO; and (c) A qualified majority of votes, in proportion to the respective percentage of ownership of the UNLLO, shall be required for decisions that affect the ownership or form of the UNLLO.	The law should provide that, unless otherwise indicated in the members' agreement: (a) The members of an UNLLO shall have equal voting rights or in proportion to their respective percentage of ownership of the UNLLO; (b) A qualified majority of votes, in proportion to the respective percentage of ownership of the UNLLO, shall be required for the following decisions: (i) Amendment of the members' agreement of the UNLLO; (ii) Mergers, restructuring, or conversion of the UNLLO; or (iii) Dissolution or winding-up of the UNLLO; or (c) Any other matters shall be decided by a majority of votes in proportion to the respective percentage of ownership of the UNLLO.
PROPOSAL C	**PROPOSAL D**
Recommendation 12	**Recommendation 12**
The law should provide that, unless otherwise provided in the members' agreement and except as provided below, decisions with respect to an UNLLO shall be made by a majority of the members or, if the UNLLO has managers, by a majority of the managers. The law should also provide that the consent of all members is necessary to: (a) Authorize an act of the UNLLO that is not in the UNLLO's ordinary course of business; (b) Amend the members' agreement of the UNLLO; or (c) Merge, restructure, or convert the UNLLO; or (d) Dissolve or wind up the UNLLO.	The law should provide that, unless otherwise provided in the members' agreement and except as provided below, decisions with respect to an UNLLO shall be made by a majority of the members [by their voting rights] or, if the UNLLO has managers, by a majority of the managers. The law should also provide that, unless otherwise provided in the members' agreement, [the consent of all members/a decision by a qualified majority on the members] is necessary to: [(a) Authorize an act of the UNLLO that is not in the UNLLO's ordinary course of business;] (b) Amend the members' agreement of the UNLLO; (c) Merge, restructure, or convert the UNLLO; or (d) Dissolve or wind up the UNLLO.
PROPOSAL E	**PROPOSAL F**
Recommendation 12	**Recommendation 12**
The law should specify that, when the UNLLO is member-managed (i.e., managed by all members), the following rules apply: (a) The following matters shall be decided by [a qualified majority of voting rights]/[a unanimous decision] of the members: (i) Mergers, restructuring, or conversion of the UNLLO; (ii) Dissolution or winding-up of the UNLLO; or (iii) Amendment of the members' agreement of the UNLLO;	The law should provide that: (a) The following matters shall be decided by a majority of voting rights of the members: (i) Any appointment of managers and any dismissal of appointed managers; (ii) Distribution; (b) The following matters shall be decided by a qualified majority of voting rights of the members: (i) Mergers, restructuring, or conversion of the UNLLO; (ii) Dissolution or winding-up of the UNLLO; or

(b) Any other matters shall be decided by a majority [of voting rights] of the members.	(iii) Amendmen. of the members' agreement of the UNLLO? (c) Unless otherwise provided for in the members' agreement, where all members are managers, differences arising between members on any other matter shall be decided by a majority [of voting rights] of the members; (d) Unless otherwise provided for in the members' agreement, where managers have been appointed, differences arising between managers on any other matter shall be decided by a majority of the managers.
Recommendation 12 bis	
The law should specify that, when the UNLLO is manager-managed (i.e., not member-managed), the following rules apply: (a) The following matters shall be decided by a majority of voting rights of the members: (i) Election and dismissal of managers; (ii) Distribution? (b) The following matters shall be decided by a qualified majority of voting rights of the members: (i) Mergers, restructuring, or conversion of the UNLLO; (ii) Dissolution or winding-up of the UNLLO; or (iii) Amendment of the members' agreement of the UNLLO; (c) Unless otherwise stated in the law, any other matters shall be decided by a majority of managers.	
PROPOSAL G	**PROPOSAL H**
Recommendation 12	**Recommendation 12**
The law should provide that, unless otherwise stipulated in the members' agreement: (a) The members of an UNLLO shall have equal voting rights, unless they have a different percentage in the ownership of the UNLLO and stipulated in the members' agreement; (b) A qualified majority shall be required for the following decisions of the members: (i) Amendment of the members' agreement of the UNLLO; (ii) Mergers, restructuring, or conversion of the UNLLO; or (iii) Dissolution or winding-up of the UNLLO; (c) Any other members' decision shall be taken by a majority vote.	The law should provide that, unless otherwise stipulated in the members' agreement: (a) The members of an UNLLO shall have equal voting rights, unless they have a different percentage in the ownership of the UNLLO as stipulated in the members' agreement; (b) A [qualified majority] shall be required for the following decisions of the members: (i) Amendment of the members' agreement of the UNLLO; (ii) Mergers, restructuring, or conversion of the UNLLO; or (iii) Dissolution or winding-up of the UNLLO; (c) Any other decisions reserved for members in the members' agreement or assigned by law shall be taken by majority vote.

Recommendation 14	Recommendation 14
(a) The law should provide that each manager individually has the authority to bind the UNLLO. Restrictions upon this authority will not be effective against third parties dealing with the UNLLO; (b) The managers are responsible for all matters not assigned by law or the members' agreement to the members; (c) Unless otherwise provided for in the members' agreement, where there is more than one manager appointed, differences arising between them shall be decided by a majority vote.	The law should provide that each manager individually has the authority to bind the UNLLO. Restrictions upon this authority will not be effective against third parties dealing with the UNLLO.
	Recommendation 14 bis
	The law should provide that... (a) The managers are responsible for all matters not assigned by law or the members' agreement to the members; (b) Unless otherwise provided for in the members' agreement, differences among managers shall be resolved by majority vote.

United Nations A/CN.9/964

General Assembly

Distr.: General
6 November 2018

Original: English

United Nations Commission on International Trade Law
Fifty-second session
Vienna, 8–26 July 2019

Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)

I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the investor-State dispute settlement (ISDS) framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of ISDS. In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. At its thirty-fourth and thirty-fifth sessions, the Working Group considered possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group at

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

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the thirty-fourth session were set out in document A/CN.9/930/Rev.1, A/CN.9/930/Rev.1/Add.1 and at the thirty-fifth session, in document A/CN.9/935.

4. At its fifty-first session, the Commission took note of the discussions of the Working Group, which had focused on the first phase of its mandate (to identify and consider concerns regarding ISDS). The Commission welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. The Commission noted the engagement of the Working Group, and of the Secretariat, with diverse stakeholders, including intergovernmental organizations such as the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the International Centre for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA).[2] At that session, the Commission also expressed its appreciation for the provision of information by various stakeholders to assist the Working Group in its deliberations, as well as for proposals by an academic forum and a group of practitioners to make information from their research and experience available to the Working Group.[3]

5. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.[4]

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirty-sixth session in Vienna from 29 October to 2 November 2018. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mauritania, Mauritius, Mexico, Namibia, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Albania, Algeria, Bahrain, Belgium, Benin, Burkina Faso, Central African Republic, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Gabon, Georgia, Guinea, Iceland, Ireland, Kyrgyzstan, Latvia, Madagascar, Mali, Morocco, Myanmar, Netherlands, New Zealand, Paraguay, Peru, Portugal, Senegal, Serbia, Slovakia, South Africa, Sudan, Sweden, Togo, Uruguay, Uzbekistan and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Central American Court of Justice (CACJ), Commonwealth Secretariat, Energy Charter Conference, OECD,

[2] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), paras. 140 and 143.
[3] Ibid., para. 144.
[4] Ibid., para. 145.

Organisation Internationale de la Francophonie (OIF), Organization of the Petroleum Exporting Countries (OPEC) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Africa World Institute (IAM), African Center of International Law Practice (ACILP), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Legal Studies (CILS), Centre for International Environmental Law (CIEL), Centre for International Governance Innovation, Centre for International Law (CIL), Centre for Research on Multinational Corporations (SOMO), Centre of Excellence for International Courts (ICOURTS), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Client Earth, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), Eurasian Economic Commission (EEC), European Federation for Investment Law and Arbitration (EFILA), European Federation for Transport and Environment (T&E), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Geneva Center for International Dispute Settlement (CIDS), Georgian International Arbitration Centre (GIAC), Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Trade Union Confederation (ITUC), Korean Commercial Arbitration Board (KCAB), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), Pluricourts, Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), South Centre (SC), Swiss Arbitration Association (ASA), Law Association for Asia and the Pacific (LAWASIA), Vienna International Arbitration Centre (VIAC) and World Economic Forum (WEF).

10. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.148); (b) note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" (A/CN.9/WG.III/WP.149) as well as notes by the Secretariat respectively on consistency and related matters (A/CN.9/WG.III/WP.150), on ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (A/CN.9/WG.III/WP.151), on arbitrators and decision makers (appointment mechanisms and related issues) (A/CN.9/WG.III/WP.152) and on cost and duration (A/CN.9/WG.III/WP.153); and (c) submission by the Government of the Republic of Korea providing a summary of the intersessional regional meeting on ISDS reforms (A/CN.9/WG.III/WP.154).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 11 above. The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

IV. Possible reform of investor-State dispute settlement (ISDS)

A. General remarks

Inter-sessional Regional Meeting and assistance by informal groups

14. Before engaging in substantive deliberations, the Working Group was updated of the discussions during the fifty-first session of the Commission (see para. 4 above) and heard an oral report of the first Inter-sessional Regional Meeting on ISDS Reform (10 and 11 September 2018, Incheon, Republic of Korea). The Meeting had provided the opportunity to raise awareness in the Asia-Pacific region of the current work of the Working Group and to share experiences and views on the ISDS regime, as reflected in document A/CN.9/WG.III/WP.154. The Working Group expressed its appreciation to the Government of the Republic of Korea and the Secretariat for organizing the Meeting and it was suggested that intersessional meetings in other regions could also be beneficial.

15. Upon request by the Commission at its fifty-first session,[5] the Working Group also took note of information on interaction between the Working Group and the Academic Forum as well as the Practitioners Group, which had been set up as informal groups aimed at making constructive contributions to the ongoing discussions on possible ISDS reform.[6]

General statement

16. The Working Group heard a general statement underlining the importance of improving the global investment environment in a way that encouraged fairness and promoted investment policies in line with the three pillars of sustainable development. It was stated that, appropriate investment policies, including transparent and fair ISDS regimes, were key components of the investment environment, and that discussions on the concerns and possible reforms of ISDS were of central importance to developing States that adopted such regimes. In that context, it was said that any dispute settlement regime should appropriately address the rights and obligations of foreign investors and that the right to regulate and the flexibility of States to protect legitimate public welfare objectives should be respected. The necessity of a multilateral spirit in the discussions was emphasized. It was further said that the effectiveness and legitimacy of such process rested on the active and wide participation of both developing and developed States to present their experiences and views on the direction and content of any possible reform.

Implementation of the mandate

17. Recalling the mandate given to it by the Commission (see para. 2 above), the Working Group considered the organization of its deliberations at the current session. The Working Group noted that, at its previous sessions, it had sought to identify concerns in the field of ISDS, in accordance with the first phase of its mandate. It was further noted that the current session would therefore be devoted to considering and reaching a decision on whether reforms were desirable in light of those identified concerns, implementing the second phase of its mandate. It was, however, stressed

[5] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 144.

[6] Additional information on the Academic Forum and the Practitioners' Group is available at the UNCITRAL website (https://uncitral.un.org/en/library/online_resources/investor-state_dispute).

that this would not preclude the identification of any additional concerns that might need to be addressed by the Working Group as it made progress.

18. It was stated that, in considering the desirability of reforms, the objective for the Working Group would be to decide whether some types of reform would be desirable to respond to specific concerns that had been identified. It was generally felt that the Working Group should tackle the identified concerns individually and consider whether reforms would be desirable to address such concerns (including whether there were options available to address the concerns). It was also stated that it would be premature to engage in discussion regarding which type of reform would be preferable and which solutions would need to be developed, both of which would form the third phase of the mandate of the Working Group.

19. It was emphasized that the Working Group would need to further plan its organization of work prior to embarking in phase three of its mandate. It was stated that, if the Working Group concluded that it would be desirable to undertake reforms, it would then consider how to address those concerns, including for example, questions with respect to priority to be given, sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organizations, and inter-sessional work. In that context, the role of governments in proposing options and solutions as well as the workplan of the Working Group was highlighted.

20. Emphasizing the need to clearly distinguish the current phase of work from phase three where solutions would be sought, it was suggested that the Working Group might wish to develop criteria for considering the "desirability" of reform (for example, whether the identified concerns were well-founded, whether they were serious enough to justify reforms, and whether UNCITRAL would be the appropriate forum to provide the solutions). It was stated that an in-depth analysis of these criteria would facilitate constructive discussion when the Working Group eventually discussed possible reform options as part of implementation of phase three of the mandate. There was some support for the Working Group discussing the criteria to be used in considering the desirability of reform. With respect to the criteria on whether UNCITRAL was the appropriate forum, it was clarified that the question being posed was whether UNCITRAL would be the appropriate body to implement the solutions and not whether UNCITRAL was the appropriate body where discussion should take place.

21. In response, it was mentioned that determination of desirability should be made based on views expressed by individual States in accordance with their own respective criteria, which would vary depending on their experience with ISDS. It was stressed that it would be preferable to leave it to each State to express its views, in light of its own criteria. The Working Group decided to proceed in that manner.

22. It was suggested that document A/CN.9/WG.III/WP.149, which summarized the possible causes and prevalence as well as the seriousness of the concerns could provide a sound basis for the discussion. It was mentioned that the concerns have been presented as falling into three broad categories (those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision makers; and those pertaining to cost and duration of ISDS cases) for ease of deliberation. It was generally felt that such categorization was a useful pragmatic basis for moving the discussion forward, while views were also expressed that issues within the different categories were often interlinked and that when considering possible options, the Working Group should not be bound by the concerns as broadly categorized. It was also stated that concerns about legitimacy related to all three categories of concerns and that the concerns, as categorized, should not limit how the Working Group would address possible reforms.

23. It was further suggested that the Working Group, in considering the desirability of reforms, should distinguish concerns that were based on facts and those that were based on perception, understanding that both types of concerns deserved attention. However, it was also stated that there was no merit in making distinction between

such concerns at the current phase as they were closely linked with the legitimacy of the ISDS regime as a whole.

24. It was also mentioned that document A/CN.9/WG.III/WP.149 included reform options that had been presented during the previous deliberations of the Working Group to illustrate the wide range of possible solutions. It was said that the options were presented to facilitate the discussion of the Working Group on the desirability of reforms. It was emphasized that those options were not exclusive nor was the list of options exhaustive.

B. Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

25. The Working Group undertook its consideration of whether the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals were concerns that warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 9 and 10), A/CN.9/WG.III/WP.150 and A/CN.9/915.

26. During its deliberation, the attention of the Working Group was drawn to an IBA report titled "Consistency, efficiency and transparency in investment treaty arbitration", which outlined specific questions regarding consistency and efficiency, including potential solutions.

1. Divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency

27. The Working Group first considered concerns relating to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency.

28. The Working Group recalled its previous discussion where the importance of a coherent and consistent ISDS regime providing for correct and predictable outcomes was highlighted as enhancing confidence in the investment environment and legitimacy of the ISDS regime. The Working Group had noted that different factors might lead to different arbitral decisions (for example, the rules of treaty interpretation required a tribunal to consider more than the ordinary meaning to be given to the terms of a treaty provision when interpreting it, the manner and the extent to which relevant evidence were presented, and how disputing parties made their arguments). The Working Group further recalled that a distinction had been made between divergence in decisions that could be justified and differing interpretations which could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty, or of the same procedural issue, particularly when the facts were similar). It was recalled that the Working Group had agreed to focus its discussion on those scenarios in which different interpretations could not be justified.

29. In response to a suggestion that the questions of consistency, coherence, predictability and correctness of arbitral decisions deserved a more in-depth analysis, it was clarified that the focus of the discussion should be on whether the overall situation as illustrated in document A/CN.9/WG.III/WP.150 raised concerns that made reforms desirable, and not on specific examples of divergent treaty interpretations. It was further mentioned that the examples presented in that document were illustrative and not exhaustive. It was said that States were invited to conduct more in-depth analysis of those examples. It was further said that some States had conducted such an analysis and had concluded that some, but not all, of the examples were instances of unjustifiable inconsistency.

30. Views were expressed that the lack of consistency, coherence, predictability and correctness of arbitral decisions was a material concern and not only one of

perception. It was said that such a lack negatively affected the reliability, effectiveness and predictability of the ISDS regime and its overall credibility and legitimacy. The view was expressed that this would run contrary to fostering foreign direct investment to achieve the Sustainable Development Goals. It was further mentioned that the lack of consistency could also have financial and political impact on States as they relied on a coherent and predictable framework when developing their investment policies. Further, investors would also be affected when deciding whether to invest in a State and whether to pursue an ISDS claim.

31. It was said that concerns were particularly acute when different ISDS tribunals had reached contradicting conclusions about the same or similar substantive standard or about the same procedural issue, particularly when the facts were similar or a different outcome could not be justified. It was indicated that document A/CN.9/WG.III/WP.150 provided some examples where inconsistent decisions by tribunals were viewed as problematic.

32. It was indicated that the concerns also related to annulment as well as recognition and enforcement of arbitral awards, as these procedures have also given rise to inconsistent approaches and outcomes. The distinction between procedures involving ICSID and non-ICSID awards was underlined. While ICSID awards were subject to annulment procedures under the ICSID Convention, arbitral awards rendered in non-ICSID arbitrations were subject to set aside and enforcement procedures in national courts.

33. It was suggested that it might be useful to identify the causes or sources leading to the lack of consistency, coherence, predictability and correctness of arbitral decisions in order to develop any possible solution. In that light, it was mentioned that substantive protection standards were found in different sources of law, including investment treaties and domestic investment laws, which resulted in fragmentation. It was further pointed out that investment disputes were being resolved by tribunals constituted ad hoc for solving individual disputes.

34. Further, it was suggested that the discussion should not focus on inconsistency among decisions but on ensuring the correct interpretation of investment treaty provisions. It was explained that the main concern was not that decisions were inconsistent, but that arbitral tribunals had interpreted the treaty provisions incorrectly, sometimes not taking account of the intention of the treaty parties. It was said that in considering any reform options, it would be important to consider their possible impact on States' control over their treaties. It was also questioned whether procedural reform alone could address the question of inconsistency and unpredictability.

35. The view was expressed that the divergent interpretations and procedural inconsistency were intrinsic elements of the ISDS regime and further linked with other concerns, for instance, that arbitrators did not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-disputing parties. It was further said that related questions included how the mandate of arbitrators and their powers were determined and what limitations should apply to their decision-making and interpretative powers. It was further suggested that the concerns under consideration were closely linked to the efficiency of ISDS.

36. Diverging views were expressed on the level of priority to be accorded to these concerns about unjustifiable inconsistency. Some considered that addressing these concerns was of utmost priority while others expressed the view that it was of less priority and required a long-term approach.

37. The Working Group heard examples of how States were currently addressing these concerns in their investment treaties, such as including provisions on joint interpretative declarations, providing more guidance to arbitral tribunals on the meaning of certain terms and standards, and establishing joint committees on treaty interpretation.

38. However, it was suggested that while these approaches were useful for the interpretation of a specific treaty, they did not constitute solutions for interpreting similar treaty provisions in different treaties. The importance of addressing these matters at a multilateral level was underlined. Therefore, it was said that there would be merit in discussing the options at UNCITRAL.

Decision by the Working Group

39. The Working Group completed its discussion with respect to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency. During its discussion, the Working Group was guided by the distinction made in its previous work between divergent interpretations that were justified and those that could not be justified, and its agreement to focus its discussion on the latter (see para. 28 above). There was consensus in the Working Group that there were instances of unjustifiable inconsistency.

40. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address the concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals.

2. Lack of a framework to address multiple proceedings

41. The Working Group considered concerns relating to the lack of a framework to address multiple proceedings, and whether such concerns warranted some form of reform. The Working Group recalled that that matter had been on the agenda of the Commission since its forty-sixth session, in 2013. It was noted that document A/CN.9/915 outlined the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area.

42. At the outset, it was mentioned that multiple proceedings resulting in divergent interpretation by ISDS tribunals was one of the reasons leading to the lack of consistency as previously discussed. It was mentioned that multiple proceedings distorted the balance of rights and interests of relevant stakeholders and raised other concerns as identified below.

43. It was suggested that it would be necessary for the Working Group to have a shared understanding of what was meant by multiple proceedings. For example, it was mentioned that it could be broader than concurrent or parallel proceedings encompassing successive proceedings. It was said that circumstances leading to multiple proceedings were varied, including situations where various parties, claiming in various forums and under different sources of law, sought substantially the same relief for the same measure and situations where a State faced multiple claims from unrelated investors in relation to the same measure. Furthermore, acceptance by arbitral tribunals of claims for reflective loss raised by shareholders was another instance leading to multiple claims in investment arbitration. Reference was made to work undertaken by OECD in that respect.

44. In addition, it was pointed out that an investor might pursue its claim on different legal bases, including investment treaties and contracts, as well as in different forums, including State courts, domestic arbitration, international arbitration either institutional or ad hoc. In light of the various situations, it was questioned whether relevant discussion should be limited to multiple ISDS proceedings arising under investment treaties.

45. It was recalled that, at its thirty-fourth session, the Working Group decided to focus on treaty-based ISDS and later consider the possibility of extending the results of its work to ISDS arising under contracts and investment law (see document A/CN.9/930/Rev.1, paras. 27-30). However, it was stated that concerns relating to the lack of a framework to address multiple proceedings were not limited

solely to claims under investment treaties and divergent interpretation of provisions therein. The lack of a framework also had an impact on the overall cost and duration of ISDS proceedings. It was generally felt that the concerns identified were not merely limited to treaty-based ISDS.

46. In an effort to further identify the concerns, it was pointed out that not all multiple proceedings were problematic and in that context, the right of access to justice was underlined. It was suggested that the discussion should focus on problematic situations where the multiplicity of proceedings resulted in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes. It was further said that there were examples of multiple proceedings involving entities within the same corporate structure that had given rise to multiple recovery of the same damage and created dissatisfaction among users of ISDS. It was also said that multiple proceedings undermined predictability more generally, and had damaging effects, in particular for developing States.

47. It was pointed out that the current ISDS regime lacked adequate mechanisms to address concerns arising from multiple proceedings. It was pointed out that failing parties' agreement or in the absence of a particular doctrine or procedure, tribunals lacked the basis to take initiatives when faced with multiple proceedings. It was said that in further considering that matter, possible impact on party autonomy as well as the consensual nature of arbitration should be taken into account.

48. The view was expressed that reforms would be useful to provide a more predictable framework for addressing multiple proceedings, which would be in the interest of investors and States, and promote procedural efficiency, reliability and legitimacy. The need to address the negative consequences of multiple proceedings and recurring problems, such as contradictory and irreconcilable decisions was underlined.

49. It was pointed out that there existed a number of principles and mechanisms that could be applicable to prevent, or limit the impact of, multiple proceedings. References were made to the doctrines of *lis pendens*, *res judicata* and the use of consolidation, joinder and coordination mechanisms. However, it was also stated that their application was limited. For example, it was usually not possible to consolidate proceedings which have started under different arbitration rules and/or administered by different arbitration institutions. It was further said that consolidation of claims based on different underlying treaties could prove difficult because they might contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums.

50. During the discussion, various mechanisms and tools that States have developed in their modern investment treaties were mentioned, thereby exemplifying the concerns of States. It was mentioned that treaty provisions had been drafted preventing abusive claims, prohibiting claims by shareholders where the investor itself was pursuing a remedy in a different forum, permitting claims by an investor only if the investor and the local company withdrew any pending claim and waived their rights to seek remedy before other forums, allowing consolidation, and limiting treaty shopping. It was suggested that such existing mechanisms and tools might be compiled for reference by States. It was further suggested that providing guidance to arbitral tribunals faced with multiple proceedings would be useful.

51. It was also mentioned that the majority of ISDS cases arose under investment treaties that did not include any provision to address multiple proceedings. Furthermore, it was said that the complexity of issues at stake in multiple proceedings made it difficult to address the matter solely in the context of investment treaties, and therefore a broader, holistic approach might be needed if the purpose was to create a fair and predictable ISDS regime. During the discussion, it was said that solutions developed by States and work by other international organizations should be taken into account to avoid duplication of efforts.

Decision by the Working Group

52. The Working Group completed its discussion related to the lack of a framework to address multiple proceedings.

53. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms.

3. Limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions

54. The Working Group then considered whether limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions made it desirable to undertake reforms.

55. It was pointed out that concerns expressed in this regard were intrinsically linked with concerns expressed about divergent interpretations by arbitral tribunals. It was also pointed out that these concerns covered the "correctness" of decisions as well as whether the existing mechanisms functioned properly to achieve consistent, coherent and correct outcomes.

56. As a general point, the Working Group was reminded that a key characteristic of arbitration was that it resulted in a final award, which by nature limited remedies against such awards.

57. On the meaning of "correct" decisions (including whether obtaining a correct outcome should be an objective of reform), it was mentioned that "incorrect" decisions would be those rendered where treaty provisions have been improperly interpreted by tribunals, not reflecting the intent of the parties to the treaty or contrary to the applicable rules of interpretation. It was also stated that decisions based on manifest errors of law or facts were also "incorrect", for which there was a lack of mechanism to rectify the situation. It was stated that ensuring correctness might generally assist in obtaining consistency of decisions as well.

58. It was pointed out that existing mechanisms (annulment and set aside) were designed to address significant deficiencies in the arbitral proceeding before an award was enforced. As such, post-award remedies were generally limited to this scope and did not necessarily provide the mechanism to address concerns arising from incorrect decisions or error made by arbitral tribunals. It was also pointed out that annulment committees and domestic courts were not necessarily qualified to rectify the outcomes. It was further mentioned that inconsistent decisions in the post-award stage further complicated the problem.

59. In addition to post-award remedies, emphasis was put on mechanisms during the arbitral proceedings to ensure and promote correctness of awards. References were made to non-disputing party submissions, submissions by third parties and joint interpretation committees, which were provided for in modern investment treaties. Reference was also made to the joint interpretative declarations by treaty parties, though their use had been limited. Further, the practice of scrutiny of awards by arbitral institutions was mentioned, which constituted a means to ensure correctness of awards without sacrificing the effectiveness of the proceedings.

60. Nonetheless, some doubts were expressed whether these developments sufficiently addressed the concerns particularly in light of the large number of existing treaties that did not include such mechanisms.

61. It was stressed that there was a need to raise awareness of the existing and newly developed mechanism to address the concerns. It was also stated that reference should be made to the provisions on third-party submissions in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to reform efforts by ICSID, including with regard to such submissions. Yet, it was highlighted that the current reform being undertaken by ICSID did not include aspects relating to the

annulment mechanism, which would require an amendment of the ICSID Convention. It was suggested that the Working Group might wish to take note of these developments as it considered possible solutions in phase three of its mandate.

Decision by the Working Group

62. The Working Group completed its discussion with respect to mechanisms to address inconsistency and incorrectness of decisions.

63. The Working Group concluded that the development of reforms by UNCITRAL would be desirable to address concerns related to the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.

C. Concerns pertaining to arbitrators and decision makers

64. The Working Group undertook its consideration of concerns pertaining to arbitrators and decision makers in ISDS, with a view to determining whether the relevant concerns warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 11 to 13), A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152.

65. The Working Group recalled its discussion at its thirty-fifth session on the question of decision makers in ISDS, including ethical requirements of decision makers, notably independence and impartiality, the impact of mechanisms for the constitution of tribunals, and the qualifications and powers of decision makers (A/CN.9/935, paras. 47–88).

1. Lack or apparent lack of independence and impartiality

66. The Working Group first considered concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof.

67. At the outset, it was emphasized that guaranteeing independence and impartiality of decision makers was crucial for ensuring due process, fairness, as well as the legitimacy of ISDS. Independence and impartiality were described as key elements of any system of justice, including arbitration. The concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof, were said to be particularly acute in the field of ISDS, as ISDS cases usually involved public policy issues and involved a State.

68. It was re-affirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality. The need for clear ethical standards was underlined.

69. It was mentioned that independence and impartiality were distinct, but closely related. It was pointed out that independence and impartiality were part of broader ethical requirements which also included other elements, such as adequate qualifications and competence, neutrality and accountability.

70. The Working Group discussed certain issues that were identified as potential causes of lack of independence and impartiality, and of the perception thereof, such as repeat appointments, instances of conflict of interest and/or so-called issue conflicts, as well as the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings (referred to as "double-hatting" below).

71. The fact that some arbitrators were commonly characterized as pro-State or pro-investor was also described as seemingly undermining the legitimacy of ISDS. Further, it was mentioned that dissenting opinions by arbitrators appointed by the losing party contributed to the overall perception of possible bias. It was said that repeat appointments were closely linked with the lack of diversity.

72. The Working Group also considered the practice of double-hatting. It was said that double-hatting raised concerns in that arbitrators had the possibility of deciding on, or appearing to decide on, an issue in one manner to benefit a party that they represented in another dispute. The Working Group was presented with statistics on the practice of double-hatting (see also para. 34 of document A/CN.9/WG.III/WP.152). It was indicated that the Court of Arbitration for Sport (CAS) and some private law firms had begun to prohibit that practice.

73. It was mentioned that improvements aimed at ensuring the independence and impartiality of decision makers were also being introduced by States in their investment treaties, as well as by international organizations active in the field of international investment agreements. In that light, it was said that, when considering possible solutions at a later stage, the Working Group should take into consideration the benefits and limitations of the existing framework and of the work carried out by States, international organizations, dispute resolution bodies and others involved in ISDS.

74. The Working Group turned its attention to the growing trend of including a code of conduct or ethical standards for decision makers in investment treaties and noted the ongoing efforts by States and international organizations in this regard. It was said that that trend evidenced the importance given to the matter by States as well as their underlying concerns. It was suggested that such codes of conduct or ethical standards could provide a basis for preparing a uniform code at a multilateral level. However, it was questioned whether additional work was required.

75. The view was expressed that any code of conduct would need to reflect diverse legal traditions and practices, and that it would be preferable to leave it to States to include in their investment treaties as well as to the disputing parties to determine the appropriate ethical standard. A different view was that a large number of existing treaties did not contain any standard on ethics, and that therefore a global solution was needed. Furthermore, it was said that development of a wide variety of rules on ethical standards might result in fragmentation and thus was not desirable in light of the need for a robust ethical standard that would ensure the legitimacy of ISDS.

76. During the discussion, reference was made to soft law standards that had been developed to complement investment treaties and applicable arbitration rules, including the IBA Guidelines on Conflicts of Interest in International Arbitration and the Guidelines on Party Representation in International Arbitration. Development of such guidance was described as a useful step forward and it was said that those instruments guided the conduct of decision makers in many current ISDS proceedings. It was also stated that more could be done particularly in the ISDS context including the preparation of a uniform code of ethics. In that context, it was recalled that the preparation of a code of ethics was on the agenda of UNCITRAL since its forty-eighth session, in 2015 (see also A/CN.9/855).

77. It was suggested that if a code of conduct were to be prepared at a multilateral level, it should be comprehensive, encompassing all issues related to decision makers including: independence and impartiality and other ethical requirements; conflict of interest and issue conflicts; double-hatting; disclosure requirements including relationships between decision makers and counsel; the protection of decision makers from undue pressure; challenge procedures; and possible sanctions in case of non-compliance. It was also suggested that ethical requirements should cover not only decision makers but also others involved in ISDS (including counsel and experts).

78. The Working Group recalled the suggestions made at its thirty-fifth session that the secretariats of ICSID and UNCITRAL might cooperate in developing such ethical requirements (see document A/CN.9/935, para. 64), and reiterated the importance of coordinated efforts among institutions to avoid any duplication and overlap. In that context, it was clarified that work was ongoing to provide the Working Group with background information which would facilitate its deliberations on possible preparation of a code of conduct jointly with ICSID.

79. A question was raised whether the preparation of a code of conduct to apply in the current ISDS regime would sufficiently address the concerns identified, notably as regards the effective implementation of the requirements concerned. It was suggested that a more systemic reform of an institutional nature might be necessary, itself raising the need to ensure that decision makers would be free of political interference. The need for a truly impartial ISDS regime was underlined.

80. It was also suggested that questions relating to third-party funding should also be discussed in this context. Reference was made to the report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration.

81. It was noted that views were expressed on some of the causes of the concerns with respect to independence and impartiality — with some highlighting the lack of clear standards in many existing particularly older treaties, others highlighting specific practices like double-hatting, and others pointing to the ad hoc system of party-appointed tribunals. In that light, it was stated that consideration should be given on how any proposed reforms would address the identified cause of the concerns.

Decision by the Working Group

82. The Working Group completed its discussion with respect to the lack or the apparent lack of independence and impartiality of decision makers in ISDS.

83. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS.

2. Limitations in existing challenge mechanisms

84. Based on the above conclusion, the Working Group then considered whether it would be desirable for UNCITRAL to develop reforms to respond to concerns relating to the adequacy, effectiveness and transparency of disclosure and challenge mechanisms available under existing treaties and arbitration rules.

85. It was noted that the Working Group had at its earlier sessions discussed concerns about the adequacy, effectiveness and transparency of such disclosure and challenge mechanisms in some detail. On that basis, it was suggested that improvements would be desirable to address those concerns.

86. It was generally felt that there was a need to increase the transparency of the challenge procedure and reference was made to the proposed amendments to ICSID Rules, which would require the publication of decisions or orders on challenges. It was also mentioned that balance should be sought when developing any solution between the transparency requirements and the confidential aspects of arbitration.

87. It was also suggested that one way of ensuring the effectiveness of the challenge mechanisms was to introduce time limits as well as penalties/sanctions for abusive or frivolous challenges. However, it was also stated that the potential impact of such measures, which could include discouraging well-founded challenges, would also need to be taken into account. Consequently, it was said, a balance should be sought between achieving effectiveness and preserving the rights of disputing parties to make challenges.

88. A number of other elements to be taken into account when considering possible solutions were mentioned, including the disclosure requirements, criteria for applying for disqualification, at what stages of the proceedings challenges could be made, who would make the decisions regarding the challenge, the criteria to be employed in reviewing such challenges, the potential impact of the challenge on the overall cost and duration of the arbitral proceedings, as well as the extent to which relevant information about the challenge and decision was to be made public.

Decision by the Working Group

89. The Working Group completed its discussion regarding the disclosure and challenge mechanisms and their limitations.

90. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules.

3. Lack of diversity of decision makers

91. The Working Group considered concerns expressed that the existing mechanisms in many investment treaties for constituting ISDS tribunals were not sufficient to ensure diversity of decision makers and whether those concerns warranted some type of reform.

92. The view was generally shared that the current lack of diversity in decision makers in the field of ISDS contributed to undermine the legitimacy of the ISDS regime. Relevant statistics provided by the Secretariat and presented during the session illustrated that there was indeed lack of diversity particularly in terms of gender and geographical representation. It was, however, emphasized that diversity included broader considerations, for example, in terms of age, ethnicity, language, legal background as well as the country of origin, reflecting the different stages of economic development. In that context, it was stated that promotion of diversity would ensure that decision makers had a better understanding of the policy consideration of States (particularly developing States), of local laws and practice as well as of public international law. It was stated that those aspects were closely related to the qualification of decision makers. In that context, it was mentioned that promotion of diversity should be understood in the broader context of providing equal opportunity to individuals belonging to all groups and minorities.

93. As to the cause of the lack of diversity, it was pointed out that the current ad hoc mechanisms for the constitution of tribunals could be one source. It was also stated that when parties selected decision makers, they usually placed a lot of emphasis on the expertise and experience of decision makers, which usually resulted in a very limited number of individuals being appointed. On the other hand, it was indicated that some States had succeeded in diversifying their appointments, including by appointing first-time arbitrators. It was also stated that the current party-driven appointment mechanism limited the involvement of arbitral institutions in addressing the lack diversity. Nonetheless, it was stressed that arbitral institutions had a role to play, and some were actively increasing the pool of decision makers in the ISDS proceedings they administered, particularly from under-represented groups. It was also suggested that arbitral institutions could take the initiative to limit the number of appointments of the same individuals. The need for training of potential decision makers and for capacity-building was also mentioned.

94. The Working Group took note of efforts being made by States as well as arbitral institutions to address the lack of diversity as well as existing tools that could be utilized by States. For example, it was mentioned that the panel of arbitrators in ICSID was one way of diversifying the pool of potential arbitrators. It was stated that gradual improvements were being made at both ICSID and PCA.

95. A number of statements indicated that States, when exercising their sovereign right to choose arbitrators as respondents of ISDS claims, had a significant role to play in diversifying arbitrators they appointed in ISDS cases. In a similar context, the need for both States and investors as well as their counsel to take diversity into account in appointing arbitrators was highlighted. However, it was also pointed out that under the current ad hoc system, that would be difficult as disputing parties viewed the ability to appoint arbitrators as an element in ensuring a successful outcome of the dispute. As such, the need for a multilateral or a systemic approach was suggested to ensure diversity in the ISDS regime.

96. It was also mentioned that seeking diversity should not be at the expense of experience, competence and quality. Moreover, it was mentioned that addressing lack of diversity should be an inclusive effort so that increasing greater representation by one group did not result in the marginalization of another group of individuals.

Decision by the Working Group

97. The Working Group completed its discussion of the concerns with respect to lack of diversity in ISDS.

98. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL in order to respond to concerns about the lack of appropriate diversity among decision makers in ISDS.

4. Qualifications of decision makers

99. The Working Group considered the question whether it would be desirable for UNCITRAL to develop reforms in order to respond to concerns that the existing mechanisms for constituting ISDS tribunals in existing investment treaties and arbitration rules were not sufficient to ensure that decision makers in ISDS have the appropriate qualifications to decide the cases before them.

100. The Working Group recalled its preliminary discussion on the topic at its thirty-fifth session, where diverse views had been expressed.

101. Views were reiterated that existing mechanisms for constituting ISDS tribunals were based on party autonomy and designed to ensure flexibility and that those were key features of arbitration, which made it attractive. Party appointment was referred to as a fundamental right of disputing parties in arbitration, and one of the main reasons parties agreed to submit their dispute to arbitration. It was said that the mechanism for constituting arbitral tribunals allowed parties to choose the arbitrators that they considered most qualified for solving their disputes and that, in practice, parties seldom delegated their right to participate in the constitution of ISDS tribunals. Furthermore, it was pointed out that there was a vast amount of publicly available information on arbitrators, including reputation, technical skills, language abilities and approach to the arbitral process in general, which allowed parties to decide on the most appropriate decision maker for their case.

102. It was suggested that there was nevertheless a need to enhance the current mechanisms for constituting ISDS tribunals, in particular to address the concerns relating to lack of transparency, lack of diversity in appointed decision makers, repeat appointments, and qualification of decision makers. It was suggested that guidelines could be developed for parties to follow in identifying and appointing decision makers. It was also felt that insufficient information about the constitution of ISDS tribunals resulted in limited accountability of the system. In that light, it was mentioned that arbitral institutions could be tasked with a greater role regarding the constitution of ISDS tribunals, for instance, by ensuring that appointments were more transparent, and by limiting multiple appointments of the same individuals. It was suggested that a pragmatic approach to deal with those identified concerns would be useful.

103. It was also noted that the constitution of ISDS tribunals at times involved the intervention of an appointing authority. In that context, the important role played by appointing authorities (both directly and indirectly) in constituting ISDS tribunals was highlighted and reference was made to the OECD Consultation Paper on Appointing Authorities and the Selection of Arbitrators in ISDS. The efforts by PCA to provide information on its role as appointing authority in ISDS cases (including factors considered in making appointments, which generally corresponded to the expectation of the disputing parties) as well as relevant statistics being prepared were noted. However, it was also said that there were certain limitations in disclosing information about the composition of ISDS tribunals; for example, under the UNCITRAL

Arbitration Rules, it was left to the agreement of the disputing parties or the tribunal's decision unless transparency was mandated by the treaty.

104. Views were expressed that the concerns under consideration were closely linked to other concerns, such as the lack or apparent lack of independence and impartiality of decision makers. It was also pointed out that appointed decision makers might not necessarily possess sufficient knowledge of public policy considerations in ISDS cases or of public international law.

105. In that light, it was questioned whether constituting ISDS tribunals based on party autonomy was that fundamental a characteristic of the ISDS regime. It was pointed out that, for instance, at the stage of annulment or setting aside of arbitral awards, the parties were not involved in choosing the decision maker. It was also mentioned that, in designing reform, the key feature that should be sought and preserved was the effective resolution of investment disputes through a fair and due process. In that light, it was suggested that reform of the existing mechanisms for constitution of ISDS tribunals could be envisaged, such as appointment through an independent body.

106. It was generally felt that even under the current mechanisms of party appointment, reforms were necessary as mentioned above. Those expressing concerns about the party-appointment mechanism expressed the need for reform of a more fundamental nature. Consequently, there was consensus in the Working Group with regard to the need for reform, while differing views about the extent of reform were duly noted.

Decision by the Working Group

107. The Working Group completed its discussions with respect to the existing mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.

108. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.

D. Concerns pertaining to cost and duration of ISDS cases

109. The Working Group undertook its consideration of concerns pertaining to cost and duration of ISDS proceedings with a view to determining whether relevant concerns warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 14 to 16) and A/CN.9/WG.III/WP.153.

1. Lengthy and costly ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases

110. The Working Group first considered whether concerns expressed with regard to the cost and duration of ISDS proceedings including the lack of a mechanism to address frivolous or unmeritorious cases under some investment treaties and arbitration rules warranted some type of reform.

111. Concerns expressed during the previous sessions of the Working Group with regard to cost and duration of ISDS proceedings were reiterated. The resource-intensive nature of ISDS proceedings, where respondent States and claimant investors alike had to devote extensive time and cost, was highlighted. It was stated that costs were particularly significant for developing States with scarce financial and human resources and that ISDS proceedings were often accompanied with significant reputational harm and the risk of undue regulatory chill. It was also mentioned that the high cost of ISDS cases were of particular concern to small and medium-sized enterprises with limited financial resources, which might limit their ability to access ISDS.

112. It was, however, noted that length and cost of ISDS proceedings might be the consequence of a number of other concerns that the Working Group had identified previously and that a number of issues were interlinked.

113. The deliberation of the Working Group was based on statistical data provided by the Secretariat and those presented during the session. To complement the comparative analysis provided in document A/CN.9/WG.III/WP.153 (paras. 66–75), relevant data on cost and duration of inter-States arbitration proceedings administered by PCA was provided along with possible factors that influenced the duration of those proceedings.

114. The Working Group recalled that a number of elements contributing to the cost and duration of ISDS proceedings had been identified by the Working Group (see documents A/CN.9/WG.III/WP.149, para. 17 and A/CN.9/WG.III/WP.153, paras. 76–92). In addition, it was indicated that the following might have an impact on the cost and duration of the ISDS proceedings: (i) application of provisional/interim measures by investors; (ii) bifurcation of proceedings; (iii) challenges to arbitrators; (iv) multiple appointments of arbitrators; (v) the need for translation; and (vi) delays in the rendering of the award. It was also reiterated that respondent States might require additional time to prepare for ISDS proceedings as they would need to coordinate among relevant stakeholders and, in certain cases, engage external counsel and experts to readily prepare for the case.

115. Noting that party cost (for example, fees paid by parties to their counsel) constituted a significant portion of the overall cost and that appointment, discovery or document production and rendering of the award were the most time-consuming stages in ISDS proceedings, it was stated that efforts could be made to address such aspects.

116. Having examined some of the reasons leading to length and cost of ISDS proceedings, it was said that there was a need to distinguish factors: (i) that were outside the control of the parties or could not be addressed in any reform (for example, complexity of the case, the need for translation and strategies by disputing parties); (ii) that were being addressed through improvements in procedural rules (for example, introduction of time frames and expedited procedure); and (iii) that needed a more systemic reform (for example, lack of a rule of precedent and ad hoc appointments).

117. While it was generally felt that it would be desirable to undertake reforms to improve the efficiency of ISDS, the need to strike an appropriate balance was also stressed. For example, it was emphasized that ensuring due and fair process as well as guaranteeing the quality and correctness of the outcomes should not be sacrificed for the sake of speedy resolution of ISDS.

118. The Working Group also discussed a wide range of possible mechanisms to improve the efficiency of ISDS that were being introduced by States and institutions. During the discussion, a number of references were made to mechanisms included by States in their modern treaties and to significant reform efforts under way by ICSID to tackle concerns regarding cost and duration in the proposed amendments to the ICSID Rules (see document A/CN.9/WG.III/WP.153, para. 101) with the aim to streamline the proceedings while seeking to ensure balanced improvements. While references were made to expedited procedures for low-value claims and stricter timelines, it was also mentioned that those measures might not be practicable for States particularly when they needed more time to prepare their cases. However, the need for all parties as well as the tribunal to abide by the established timeline was stressed. In addition, references were made to the following mechanisms (though not exhaustive): preventive or pre-emptive approaches, use of dispute resolution means other than arbitration such as mediation, establishing a budget at the outset with constant updates, setting a ceiling for overall costs, better case management, cost disincentives for frivolous claims and applications, prohibition of frivolous interim measure application, limitations on double-hatting (eventually leading to reduced number of challenges), statute of limitation on investor claims, early dismissal mechanism for frivolous or unmeritorious claims, limitations on standing, and

narrowing the causes of actions that investors could bring a claim (as provided for in the United States-Mexico-trade agreement).

119. References were also made to the potential benefits of setting up an advisory centre to assist States faced with difficulties in ISDS proceedings particularly with regard to cost. It was suggested that providing financial aid to developing countries should also be considered. In that context, reference was made to a study being conducted on securing adequate legal defence in proceedings under investment agreements. In addition, suggestions were made that such an advisory centre could provide training for decision makers.

120. During the deliberation, concerns were expressed with regard to the practice of third-party funding in ISDS as having an impact on the cost and duration of ISDS proceedings. It was stated that third-party funding also had an impact on other aspects of ISDS that the Working Group had decided that reforms would be desirable. It was also said that third-party funding introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it. In that context, measures being introduced by States and institutions (including ICSID) to address concerns expressed about third-party funding were mentioned.

121. While it was suggested that reforms should focus on addressing excessive and unjustified cost and duration, it was stated that even justified cost and duration posed a heavy burden on the disputing parties and that such characterization of the concern could limit the consideration by the Working Group of options to improve the efficiency of the ISDS proceedings. With respect to the suggestion that a more systemic and holistic approach would be necessary as a number of concerns were interlinked, it was mentioned there could be merit in adopting a number of the ongoing reform efforts in a more systemic manner.

Decision by the Working Group

122. The Working Group completed its discussion on concerns with respect to the cost and duration of ISDS proceedings including the lack of a mechanism to address frivolous or unmeritorious claims.

123. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to cost and duration of ISDS proceedings.

2. Allocation of costs in ISDS

124. The Working Group then considered whether concerns expressed with regard to allocation of cost by arbitral tribunals in ISDS warranted some type of reform. The Working Group took note of the existing approaches and relevant rules on allocation of cost.

125. With respect to the question whether the identified concerns deserved reform by UNCITRAL, it was generally felt that there was a need to consider the adequacy of the relevant rules on cost allocation and how arbitral tribunals in ISDS were applying those rules. It was suggested that if tribunals took into account the behaviour of the parties in allocating cost, it could have a positive impact in reducing overall costs.

126. The difficulty and inconsistency in allocating costs in proportion to the success of the disputing parties was highlighted and it was stated that guidance to tribunals on allocating costs would be useful on, for instance, when to depart from the default rule, when and how to take into account party behaviour and third-party funding.

Decision by the Working Group

127. The Working Group completed its discussion on concerns with respect to allocation of costs by arbitral tribunals in ISDS and concluded that it was desirable that reforms be developed by UNCITRAL to address those concerns.

3. Concerns regarding the availability of security for cost in ISDS

128. The Working Group considered whether it would be desirable for UNCITRAL to develop reforms to address the concerns related to limited availability of security for costs in ISDS in light of difficulties faced by States in recovering costs.

129. It was noted that ISDS tribunals seldom ordered security for costs and had done so in very exceptional circumstances, despite the fact that certain arbitration rules provided for that possibility. It was generally felt that, as a result, respondent States had not been able to recover a substantial part or any of their costs in defending unsuccessful, frivolous or bad faith claims by investors.

130. During the discussion, it was pointed out that investors had also used shell companies, or became impecunious, making cost recovery by States impossible. That issue was highlighted as exemplifying the imbalance between parties, because States, given their permanence, were in a different position from investors, who might be unwilling or unable to pay. Therefore, concerns regarding the availability of security for costs were widely shared.

131. It was suggested that the availability of security for costs might assist in the early dismissal of frivolous claims. It was, however, cautioned that, ordering security for cost should not in any way limit the possibility for small and medium-sized enterprises to access ISDS and that a balanced approach should be adopted, taking into account different interests at stake.

Decision by the Working Group

132. The Working Group completed its discussion with respect to the difficulties faced by successful States to recover some or all of their costs from claimant investors, and the need for rules on security for cost.

133. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to security for cost.

4. Concerns regarding third-party funding

134. Regarding third-party funding, the Working Group took note of a number of observations made including concerns expressed on the matter at its current session (see para. 120 above). Noting that the Secretariat was preparing a background note on the topic, the Working Group decided to consider whether it would be desirable for UNCITRAL to undertake reform on that matter at its next session.

E. Organization of work at the forthcoming session

135. The Working Group noted that it had completed its review of the three broad categories of concerns laid out in document A/CN.9/WG.III/WP.149, as further explored in documents A/CN.9/WG.III/WP.151, A/CN.9/WG.III/WP.152 and A/CN.9/WG.III/WP.153. The Working Group further noted that it had decided on the desirability of developing reforms in UNCITRAL with respect to those concerns.

136. The Working Group considered how it would conduct its work at its forthcoming session. The Working Group agreed that it would first consider the concerns related to third-party funding (see para. 134 above).

137. The Working Group took note that it would then have to consider, as indicated in paragraph 17 of document A/CN.9/WG.III/WP.149, other concerns not covered by the broad categories of desirable reforms already identified. In that context, governments that wished to raise additional concerns were encouraged to submit them in writing before the next session.

138. The Working Group agreed that next it would have to develop a work plan to address the concerns for which it had decided that reform by UNCITRAL was desirable.

139. It was suggested that before getting into discussion on solutions, governments should: (i) identify specific elements or aspects of the three broad categories of concern, and (ii) assign levels of priority among such identified elements or aspects. On the other hand, it was said that the Working Group should work on comprehensive reform and use prioritization as a tool to order the work of the Working Group but not to miss out on areas of reform. It was agreed that, instead of pursing the discussion at this session, this would be further discussed at the next session.

140. Reflecting the government-led process in the Working Group, governments were encouraged to consult and submit written proposals for the development of the workplan in time for the next session. It was noted that the workplan would address: (i) how some or all of the concerns that the Working Group identified as desirable for reform should be addressed in phase three of the mandate, and (ii) questions such as sequencing, priority, coordination with other organizations, multiple tracks, ways to continue the work between sessions of the Working Group, and any other matter that the Working Group considered necessary. The Secretariat was also requested to prepare a note on the options available to facilitate the work plan developed by the Working Group.

141. It was also emphasized that at its forthcoming sessions, the Working Group would pursue an in-depth consideration of the issues involved, allowing sufficient time for governments to provide input. The Working Group would also seek to be efficient and effective in making progress in its deliberations and in building consensus on reform options. Those deliberations would encompass all options for reform that the Working Group wished to explore and would also benefit from expert input from all stakeholders.

142. The Working Group recalled the importance of inclusivity in its process, and of a wide and active participation by both developing and developed States in its sessions, so as to ensure that the Working Group was able to benefit from high-level input from all governments in discharging its mandate. In that context, it was recalled that the European Union as well as the Swiss Agency for Development and Cooperation had provided contributions to the UNCITRAL trust fund, in order to allow participation of developing States in the deliberations of the Working Group. Delegations were invited to consider making further contributions to allow for inclusive attendance at future sessions of the Working Group.

United Nations A/CN.9/965

General Assembly

Distr.: General
23 November 2018

Original: English

United Nations Commission on International Trade Law
Fifty-second session
Vienna, 8–26 July 2019

Report of Working Group IV (Electronic Commerce) on the work of its fifty-seventh session (Vienna, 19–23 November 2018)

I. Introduction

1. Background information on the work of the Working Group on legal issues related to identity management (IdM) systems and trust services may be found in working paper A/CN.9/WG.IV/WP.152, paragraphs 6–17. Following the Working Group's recommendation (A/CN.9/936, para. 95), the Commission requested the Working Group to conduct work on legal issues relating to IdM and trust services with a view to preparing a text aimed at facilitating cross-border recognition of IdM and trust services.[1] The Commission's request is framed in terms sufficiently broad to include aspects of the legal treatment of IdM and trust services additional to those already identified by the Working Group at its earlier sessions.

II. Organization of the session

2. The Working Group, composed of all States members of the Commission, held its fifty-seventh session in Vienna from 19 to 23 November 2018. The session was attended by representatives of the following States members of the Working Group: Armenia, Austria, Belarus, Brazil, Bulgaria, Burundi, Canada, China, Czechia, Ecuador, El Salvador, France, Germany, Greece, Hungary, Iran (Islamic Republic of), Italy, Japan, Kenya, Malaysia, Mexico, Pakistan, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Algeria, Belgium, Bolivia (Plurinational State of), Dominican Republic, Myanmar, Peru, Qatar, Sweden, Timor-Leste and Yemen.

4. The session was also attended by observers from the Holy See and the European Union.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 159.

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5. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: Commonwealth Secretariat, Gulf Cooperation Council, and Organisation internationale de la Francophonie;

(c) *International non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Association Droit & Méditerranée (Jurimed), Brazilian Chamber of Electronic Commerce (Camara-e.net), Centre for International Legal Education (University of Pittsburgh) (CILE), European Multi-channel and Online Trade Association (EMOTA), GSM Association (GSMA), Institute of Law and Technology (Masaryk University), International Federation of Freight Forwarders Associations (FIATA), International Trademark Association (INTA), International Union of Notaries (UINL), Jerusalem Arbitration Center (JAC) and Law Association for Asia and the Pacific (LAWASIA).

6. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Mr. Tomas KOZAREK (Czechia)

7. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.IV/WP.152); (b) notes by the Secretariat on legal issues related to IdM and trust services (A/CN.9/WG.IV/WP.153 and A/CN.9/WG.IV/WP.154); and (c) a proposal by Germany containing a draft instrument on cross-border legal recognition of IdM and trust services and a table with a road map for discussion of legal aspects of IdM and trust services (A/CN.9/WG.IV/WP.155 and Add.1).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Legal issues related to identity management and trust services.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

9. The Working Group continued consideration of legal issues related to IdM and trust services on the basis of the documents listed in paragraph 7 above. The deliberations and decisions of the Working Group on that topic are found in chapter IV of this report.

IV. Legal issues related to identity management and trust services

A. Scope of work

10. Acknowledging that the foundational identity of physical and legal persons was a matter for States to address, the Working Group confirmed that its work should focus on issues of transactional identity and, in that context, on issues of recognition rather than attribution of identity. At the same time, the Working Group recognized

that foundational identity issues might be relevant for its work since foundational identity might be required by law or used by contracting parties for establishing transactional identity.

11. The Working Group discussed whether its work should focus on facilitating reliable identification of both subjects and objects of transactions and confirmed that a clear distinction between the two concepts — subjects and objects — should be maintained. It was acknowledged that the identification of objects might be necessary to identify subjects of transactions, i.e. persons to whom rights, obligations and liabilities arising from transactions would be attributed. At the same time, it was said that an object did not have legal personality and could not bear liability.

12. Support was expressed for the view that issues of liability would be relevant to the work by the Working Group only to the extent that they touched upon liability arising from identification services. In particular, it was stressed that the discussion of liability of objects was outside the scope of work of the Working Group. At the same time, the view was expressed that the Working Group might touch upon responsibilities of object creators, such as the responsibility to properly identify the object at the time of its creation and to establish a clear link between the object and the person that would be liable for the object's actions, since those responsibilities could be relevant for the proper identification of persons.

13. With respect to paragraphs 5 and 6 of document A/CN.9/WG.IV/WP.153, a concern was expressed that they attempted to broaden the mandate of the Working Group's work on IdM. The view was expressed that the scope of the work by the Working Group on that topic should be narrowed down to issues on which the work could be accomplished within a reasonable period. The possibility of separating the topic into several sub-topics and delivering work products on those sub-topics at different points of time was not excluded.

14. Concern was expressed about the use of the term "trust services" in the working papers before the Working Group. The preference was expressed for the use of another term, such as "trusted services providers", which would better convey the intended meaning given that the word "trust" had a settled legal meaning in certain jurisdictions (see also para. 101 below).

15. Recalling the discussion at the previous sessions, the view was reiterated that the work by the Working Group on IdM should not try to establish functionally equivalent requirements for identification in the paper-based and in the electronic environments.

16. The view was expressed that the goal of the work should be to identify elements of IdM systems that facilitated the recognition of the outcome of identification across various IdM systems. It was explained that, without imposing any solution on contracting parties, the Working Group should therefore strive to provide a toolbox of options from which contracting parties might choose depending on their needs.

17. A question was asked about the reference to identification of traders operating in the informal sector contained in paragraph 11 of document A/CN.9/WG.IV/WP.153. It was indicated that the reference reflected a consideration expressed at the fifty-sixth session of the Working Group (see A/CN.9/936, para. 63) based on the concern that relying exclusively on public identity credentials might penalize those traders that faced significant challenges in obtaining formal recognition. It was added that economic and financial inclusion was one of the considerations being taken into account by UNCITRAL.

18. It was responded that that reference should not be seen as an endorsement of the informal sector and that it was preferable to encourage the transition of informal traders to the formal sector by considering entities with legal personality only. In that respect, it was recalled that providing the legal tools to facilitate the transition from the informal to the formal economy was the subject of the work by UNCITRAL Working Group I.

19. It was further noted that the object of the work of the Working Group was to facilitate reliable identification of entities regardless of whether they operated in the formal or informal sector. In that context, the point was made that various means of identification, which would not necessarily include public identity credentials, could be accepted by contracting parties depending on commercial risks at stake in a particular transaction.

B. Legal recognition requirements and mechanisms

20. A question was raised on whether legal recognition was needed to facilitate cross-border recognition of IdM systems at the global level or other type of recognition, such as technical recognition, would be sufficient. A question was also asked on the relationship between legal and factual recognition.

21. In response, it was noted that some level of trust was desirable before entering into commercial electronic transactions to better assess risks and reduce transaction costs. It was also noted that parties to a transaction seeking a higher level of legal certainty would pursue legal recognition of identification and that the overall goal of the Working Group was to increase trust in the use of digital identity. It was added that ex ante legal recognition would be one of the means to build trust.

22. It was indicated that the Working Group should focus on identifying the requirements of legal recognition and should not deal with technical aspects due to their constant evolution. It was further indicated that the work of the Working Group should neither introduce new obligations to identify nor affect existing ones (see also para. 110 below).

23. It was said that legal recognition of IdM systems may lower transaction costs given that the credentials issued under a system would be recognized without further assessment. It was also said that an efficient legal recognition mechanism should avoid the need for a double assessment, for instance in the originating and in the receiving jurisdictions.

24. It was indicated that the object of legal recognition was the preliminary question to address. It was explained that legal recognition could refer to recognition of IdM systems, of identity credentials or of the outcome of the identification process (see also A/CN.9/WG.IV/WP.153, paras. 57–58).

25. It was said that granting legal recognition to the outcome of the identification process could better address different approaches to identification, in particular in jurisdictions that did not make reference to the notion of level of assurance. It was added that legal recognition of outcomes was necessary to overcome reciprocity concerns that could arise with respect to legal recognition of IdM systems.

26. On the other hand, it was explained that recognition of IdM systems might facilitate recognition of credentials that, in turn, might facilitate recognition of the transaction where the credentials were used, i.e. the outcome of the identification process. Hence, it was indicated that the legal recognition of all those elements was complementary. It was added that recognition of credentials or of the outcome of the identification process should be possible where recognition of IdM systems was not.

27. It was added that public and private IdM systems were widely used and that a harmonized description of applicable levels of assurance, based on a set of rules and policies, was necessary to ensure the legal recognition of those IdM systems and increase the trust of business partners.

28. It was indicated that another preliminary question pertained to the effects of legal recognition. Reference was made to the options listed in paragraph 55 of document A/CN.9/WG.IV/WP.153. In response to a query, it was explained that the words "granting the same legal status as in the receiving jurisdiction, regardless of any foreign element" contained in that paragraph referred to granting legal

recognition without consideration of any foreign element involved (the "national treatment" principle).

29. A concern was raised that the reference to the notion of the originating jurisdiction contained in paragraph 55 of document A/CN.9/WG.IV/WP.153 could violate the principle of system neutrality in cross-border legal recognition of digital identity by implying the mandatory use of public IdM systems and credentials. In response, it was said that that notion referred to the law applicable to the IdM system used, which could also be multinational, regardless of its private or public nature.

30. It was said that granting national treatment was the preferable approach given that the presence of a foreign element should not per se be a reason to discriminate in international trade. It was added that another reason favouring such approach was that judges and other authorities could face difficulties in applying foreign laws and legal notions.

31. It was also said that, given the existence of national sets of requirements for IdM systems, the only feasible approach to legal recognition was the definition of its legal effects in a dedicated instrument.

32. Another view was that the effects of legal recognition would depend on the reliability of the IdM system used. In that line, it was explained that the use of an IdM system complying with a higher level of assurance could facilitate its cross-border legal recognition.

33. It was indicated that further clarification was needed on the legal effects of recognition. For example, it was suggested to clarify whether and under which conditions the statutory limitation of the liability of an identity services provider under a certain national law chosen by the parties to a commercial transaction could be upheld in another jurisdiction.

34. The question was raised on which entity should carry out any assessment necessary for legal recognition. It was stressed that most commercial transactions did not involve public authorities. In response, it was said that the assessment could be carried out by public entities, by accredited third parties, by dedicated organizations or by the parties to the commercial transaction.

35. It was further indicated that, while the assessment necessary for legal recognition could be carried out by private parties, the existence of an enabling legislative framework was necessary to provide legal recognition. It was added that, absent that legislative framework, parties' agreement on the law applicable to identification might not be upheld.

36. In response to a query, it was clarified that the draft provisions contained in the working papers before the Working Group had an illustrative nature at the early stage of the Working Group deliberations, without prejudice to their possible future detailed consideration.

37. It was explained that the decision to recognize IdM systems was based on trust, and that the essential elements needed to build such trust were the fundamental issue for discussion in the Working Group. It was further explained that trust could come from experience or as a result of the participation in an environment of trust. It was suggested that the use of an environment of trust could promote a higher level of legal certainty and that the Working Group should therefore work on creating such environment by defining its essential elements. It was stated that those essential elements were the minimum set of appropriate rules on how IdM systems should work, including on audit, insurance, certification, liability, and termination or other changes in levels of assurance, and mechanisms to ensure and verify that participants followed those rules. It was indicated that such environment of trust would allow business actors to rely upon and recognize the outcomes of IdM systems.

38. It was stressed that needs of developing countries should be duly taken into consideration in order to ensure the compatibility of any work product with all economic and legal systems and all levels of development. It was recalled that

one goal was to promote electronic commerce involving developing countries. It was indicated that the full implementation of the principle of technology neutrality was desirable to prevent the adoption of technical requirements that would be too costly or sophisticated for traders in developing countries.

39. A point was made that notification schemes were not alternative to levels of assurance. It was explained that the notification process involved the notification of IdM systems that conformed to pre-established standards as a step subsequent to the determination of a minimum set of rules and the assessment of IdM systems against those rules. A regional example combining notification schemes and levels of assurance was provided. It was explained that that example could be replicated for purely private sector purposes without the involvement of public authorities.

40. As regards specific legal recognition mechanisms, it was suggested that the Working Group should focus on the creation of a centralized minimal environment of trust, members of which would reach consensus on rules and policies that would underlie that environment. However, the view was also expressed that, although in theory desirable, it would be unrealistic to foresee the creation of a supranational body that would fulfil such functions.

41. Another view was that the Working Group should consider a legal recognition mechanism based on mapping and whitelisting of existing public and private accreditation schemes against parameters to be determined. It was explained that such parameters for privately run schemes might include, for example, the requirements for audit and insurance, and that the list of accredited schemes would not be exhaustive.

42. Views differed on whether the ex ante, the ex post or the mapping-based approach discussed in paragraphs 61 to 92 of document A/CN.9/WG.V/WP.153 should be taken. Positive and negative aspects of each approach were illustrated. It was considered important for the Working Group to identify those features of each approach acceptable to all States as well as problematic issues.

43. One view was that the mapping-based approach was preferable because of its flexibility in accommodating both ex ante and ex post legal recognition. Another view pointed at the advantages of ex post recognition given that legal operability would not be easy to achieve in jurisdictions lacking any IdM system. It was suggested that, due to cost-related and other considerations, business users in developing countries may favour legal recognition mechanisms that operated only in case of dispute, i.e. based on the ex post approach.

44. The prevailing view was that making the choice among those three approaches would be premature and undesirable: premature because of the insufficient experience with their use; and undesirable since all options should be retained to provide broader choice to business operators.

45. Moreover, making such choice was considered premature also because of the need to first identify obstacles to cross-border recognition of IdM systems. It was explained that, despite a widespread assumption that at a transactional level it would be beneficial and, in some cases, necessary for trading parties to have a higher level of trust in the identity of other parties, few cross-border recognition mechanisms of IdM systems existed. It was added that there could be different reasons for that situation, for example lack of information about the IdM system of the originating jurisdiction or because the results of the foreign assessment of the IdM system were not comparable or comprehensible. Identifying those reasons was considered essential to find appropriate legal solutions. In response, a question was raised whether obstacles indeed existed, or trading partners were comfortable with the status quo.

46. A point was also made that any solution should not be exclusive and that, while respecting legal requirements of any region or country, it should facilitate development and use of other options. It was noted that cost implications could determine which approach would prevail.

47. It was explained that those approaches were not mutually exclusive: for example, the mapping-based approach allowed both ex ante and ex post assessment of IdM systems against a predetermined set of rules. It was added that ex ante legal recognition was often used for the higher levels of assurance while ex post legal recognition was used for the lower levels. It was noted that legal presumptions and the burden of proof would vary with the level of assurance and would be known to the parties in advance to allow them to assess the consequences of relying on a particular approach.

48. Doubts were expressed that the mapping-based approach was a separate approach. Some delegations viewed the mapping as a step in an ex ante and ex post legal recognition. Other delegations considered the mapping-based approach a variation of an ex ante approach since it presupposed the existence of common rules agreed upon in advance by the participants in the mapping exercise and the involvement of a central public or private authority in the assessment.

49. Different views were expressed on the involvement of public authorities in a legal recognition mechanism. One view was that that involvement was desirable to support IdM systems offering a higher degree of trust. It was added that the involvement of public authorities could be useful to prevent the imposition of technical standards by larger market players on smaller ones. It was also indicated that the implementation of a cross-border recognition mechanism necessarily implied the involvement of public authorities due to its transnational nature.

50. Another view was that the involvement of public authorities in commercial transactions or the introduction of other forms of central control over those transactions should be limited. It was noted that significant cross-border electronic trade was already taking place without that involvement. It was suggested that further evidence based on experience should be made available to justify a bigger role of public authorities in cross-border recognition of IdM systems. The view was reiterated that the work on IdM should not proceed on the assumption that IdM systems and their legal recognition would necessarily or primarily be based on the involvement of public authorities, and that instead in the business-to-business context the focus should be on privately-run IdM systems and recognition.

51. Support was expressed for compiling more information on how different approaches worked in practice. In response, it was noted that UNCITRAL had prepared several successful texts in the area of electronic commerce based on limited business practice due to the novelty of the field. It was added that an UNCITRAL text on IdM systems and trust services could significantly contribute to modify the market structure and give new impulse to the use of those services.

52. In turn, it was observed that the experience in UNCITRAL demonstrated that an UNCITRAL instrument was particularly successful when it addressed a legal problem faced by the business community identified on the basis of empirical rather than theoretical knowledge. A suggestion was made to compile a list of actual problems that the UNCITRAL work on IdM would strive to address. The existence of divergent laws and approaches to IdM that raised the costs of doing business was considered one such problem that should be addressed through harmonization of laws, a task that fell under the mandate of UNCITRAL. Another problem cited was that in some cases a contracting party might be required to use a paper-based identification document for entering into an online commercial transaction. It was added that inadequate identification of the contracting party might create problems at the contract implementation stage. It was also noted that cross-border online identification posed challenges.

53. In response to a query, it was explained that the eIDAS Regulation had entered into force for the part relating to trust services in 2016 and for the part relating to IdM in September 2018. It was added that, while data was not available on its effects on the development of the IdM market given the limited time since entry into force, the effects on the development of the trust services market have already been significant.

54. In response to another query, it was explained that mapping exercises were difficult and time-consuming given also the challenges in comparing IdM systems developed on the basis of different sets of rules. It was added that the assessment of IdM systems was also costly and needed to be repeated regularly, typically on an annual basis. Another challenge, it was said, related to the frequent amendment of levels of assurance. It was further explained that the offer of private sector services for IdM systems assessment did not seem to point at a strong market demand for those services. Doubt was therefore expressed that the mapping-based approach would work at the global level. Another view was that mapping carried out by some States at the bilateral level, although time-consuming, was found very useful.

55. It was agreed that, while a decision on the most desirable mechanism for legal recognition was premature, the Working Group should continue its discussion on advantages and disadvantages of each model individually and in combination.

C. Levels of assurance

56. The Working Group discussed various aspects of the use of levels of assurance in IdM. It was explained that the level of assurance was an indicator of the level of confidence in the identification of an entity. It was added that reference to levels of assurance was critical to enable legal recognition mechanisms and that efforts should be made to harmonize the description of those levels. It was also explained that the number of levels of assurance to be made available corresponded to the number of legal effects sought, so that, for instance, if there were two legal effects associated with an IdM scheme (such as recognition or not), there would be two corresponding levels of assurance. It was also indicated that challenges related to the use of level of assurance included matching correctly those levels across borders as well as the need to frequently update them.

57. The view was expressed that a discussion on the definition of levels of assurance was premature and might involve technical issues. Broad support was expressed for the view that technical matters were outside the scope of the work of the Working Group. It was added that caution should be exercised as legal discussions could have significant implications on technological solutions. It was suggested that, if the progress of work so required, the assistance of relevant international organizations such as the International Telecommunications Union could be sought.

58. However, it was also said that the establishment of a legal recognition mechanism would require linking legal effects with properties, characteristics and attributes of the IdM system. It was added that that exercise should be outcome-based and not prescriptive and should aim at ensuring interoperability among levels of assurance.

59. It was suggested that a discussion of levels of assurance should clarify the legal consequences of the reference to those levels and that other consequences were irrelevant for the work of the Working Group. In that respect, it was indicated that the notion of levels of assurance had different legal consequences for IdM systems and for trust services. It was also indicated that different levels of assurance were associated with different legal effects, which satisfied different business needs.

60. The view was expressed that levels of assurance should be linked to discrete legal effects. However, the view was also expressed that it was not feasible to link levels of assurance with all possible legal effects. In response, it was indicated that it was possible and desirable to define a minimal set of legal effects associated with each level of assurance.

61. A question was asked on which legal effects were associated with the use of levels of assurance. Various examples were provided. It was indicated that the main legal effect was the association of a level of assurance with the reliability of the identification of a person or object (i.e. identification beyond reasonable doubt,

identification on a balance of probabilities, or failed identification), which was the core notion of the identification process.

D. Functional equivalence

62. Acknowledging that UNCITRAL made an important contribution to e-commerce development by formulating the principle of functional equivalence, the view was expressed that there could be a need for adjusting that principle to the IdM context. It was said that, while specific functions pursued by the notions of "writing", "original" and "handwritten signature" were easy to identify, it was difficult to point out the specific functions pursued by IdM. In that respect, it was noted that identification itself could be a function. The concern about attempts to establish functional equivalence between offline and online identification expressed earlier during the session (see para. 15 above) was reiterated.

63. It was suggested that provisions on IdM might need to refer to levels of assurance, degree of reliability or levels of equivalence and that provisions with different legal effects might therefore be needed for each level of assurance. It was pointed out that the "one size fits all" approach adopted in existing UNCITRAL provisions establishing functional equivalence might therefore not be appropriate in the IdM context.

64. Specific examples were provided illustrating the relationship between functional equivalence and the reference to levels of assurance in IdM. It was explained that different levels of assurance of identification might be required either by law or by contract also in the offline world. It was said that there was no consistent one-to-one match between each assurance level and offline identification.

65. The other view was that provisions on functional equivalence should not refer to levels of assurance since the latter raised technical aspects beyond the mandate of UNCITRAL, as was discussed during the session (see para. 57 above). The alternative view was that reference to levels of assurance was useful and the provisions should be redrafted to better convey that each level of assurance would produce different legal effects.

66. A question was put on whether the purpose of provisions on functional equivalence would be to establish equivalence in the legal status of online and offline IdM processes. It was pointed out that, in order to achieve that equivalence, a link with the offline IdM processes might need to be maintained in the provisions. Views differed on ways to establish that link.

67. The view was expressed that, unlike provisions on functional equivalence found in existing UNCITRAL texts that focused either on a thing (signature, writing or original) or on a state of affairs (possession), provisions on functional equivalence in the IdM context might need to focus on the IdM process. It was added that, while existing UNCITRAL provisions on functional equivalence aimed at confirming validity, in the IdM context there might be an interest to seek not only a binary answer to the question of legal recognition but also clarity on the legal effects of such recognition.

68. A question arose whether formulating specific functional equivalence provisions for each level of assurance would go beyond the functional equivalence principle by establishing rules on IdM. It was suggested that the draft provisions contained in paragraph 29 of document A/CN.9/WG.IV/WP.153 could have such effect.

69. Some support was expressed for the view that it was premature to discuss functional equivalence provisions until the scope of the work on IdM was clarified, in particular whether the work purported to achieve legal recognition of IdM processes or of the outcomes of those processes. It was noted that a functional equivalence provision would apply only if paper-based IdM was relevant. In addition, the suggestion was made to focus the discussion on an acceptable method of

identification instead of trying to elaborate narrow functional equivalence provisions to paper-based identification documents or processes. A point was also made that consideration of any drafting suggestions should be without prejudice to a decision by the Working Group on the form of a possible future text on IdM.

70. By way of preliminary remarks, it was noted that the opening wording in the draft provisions contained in paragraph 29 of document A/CN.9/WG.IV/WP.153 were misleading since, in the business-to-business context, law rarely required or permitted identification explicitly. It was explained that proper identification requirements in the business-to-business context might be implicit or simply dictated by business needs.

71. A suggestion was made to redraft the provisions as follows to reflect that different legal requirements and different levels of assurance might apply and that a decision was to be made on whether the scope of the work would encompass objects besides persons:

> "Where the law requires or permits the identification of [an entity] [person] [in a certain way], that requirement is met with respect to [electronic] [digital] identity management if a reliable method is used to [verify the [relevant] attributes of the [entity] [person] [at the same level or in the same way]]."

72. The need for defining certain terms used in the drafting suggestion, such as "a reliable method", was highlighted. It was also suggested that the provisions might need to be split into two, one containing the functional equivalence principle and the other dealing with reliability. Doubt was expressed that the provisions captured all elements of IdM. The need to capture all of those elements was stressed since deficiency in any link of the IdM chain might jeopardize the outcome.

73. It was suggested that the draft provisions contained in paragraph 29 of document A/CN.9/WG.IV/WP.153 could be redrafted as follows if they were to establish a functional equivalence to a physical identification document existing in the paper world (i.e., to a thing):

> "Where the law requires or permits the identification of a person with respect to a physical document, that requirement is met with respect to an electronic identification process if a reliable method is used to verify the relevant attributes of the person contained in that document."

74. It was indicated that IdM was a complex legal notion and that, if the provisions were to establish a functional equivalence to the IdM process, all composite elements thereof (e.g., identification and authentication) should be reflected. It was suggested that the draft provisions contained in paragraph 29 of document A/CN.9/WG.IV/WP.153 could as an example be redrafted as follows to include a reference to a "level of assurance" required under substantive law:

> "Where the law requires or permits the identification of a person on the balance of probabilities, that requirement is met with respect to an electronic identification process if a reliable method is used to verify the relevant attributes of the person to that same level."

75. Different views were expressed with respect to the drafting proposals contained in paragraphs 73 and 74 above, in particular: (a) whether specific reference to a physical or paper-based document was desirable. It was explained that in the physical world an authority in charge of identification of persons (e.g., a registry) would not necessarily produce physical identification documents but might itself be the authoritative source of identification information. It was also explained that the law might not stipulate whether paper-based or other identification means were to be used; and (b) that the notion of "balance of probabilities" was unknown and unclear. It was suggested that it might be replaced with reference to "the level of equivalence".

76. The proposal in paragraph 73 above was considered by some to be too narrow because it aimed only at establishing functional equivalence between paper-based

identification documents and electronic identification means. For those reasons, the proposal in paragraph 74 above was preferred by some.

77. In light of those comments, another drafting suggestion was made that purported to address concerns expressed on the draft provisions contained in paragraphs 73 and 74 above by merging and redrafting them:

> "Where the law or the parties require the identification of the entity or the person in accordance with a certain method, that requirement is met with respect to electronic identity management if a reliable method is used to verify the relevant attributes of the entity in accordance with the same level as assured by that method."

78. Another drafting proposal read as follows:

> "Where the parties wish or are required by law to perform the identification of a [person][subject], the application of an electronic identification procedure for this purpose has the equivalent legal effect as the application of non-electronic procedures recognized for this purpose, if the electronic identification procedure uses a reliable method to verify the attributes of the [person] [subject] relevant for this purpose."

79. Recalling that UNCITRAL texts already contained functional equivalence rules for certain trust services, namely for electronic signatures and for retention and archiving, the Working Group considered whether specific provisions should be prepared for each type of trust service, or, alternatively, a general rule on functional equivalence of IdM for all trust services could or should be drafted. The prevailing view was that specific functional equivalence provisions should be prepared for each trust service to accommodate their specific functions and that, in order to do so, a list of trust services should be compiled.

80. The value of digitalization of identities of legal persons for cross-border transactions was highlighted. It was stated that facilitating dematerialization of identification might be one of the goals of the work of the Working Group on IdM in addition to cross-border recognition of IdM systems. It was explained that in the former context, functional equivalence remained an important principle while levels of assurance or degrees of reliability were more relevant for recognition of IdM systems. A point was made that functional equivalence was an important concept also because it ensured no change in substantive law requirements.

81. After discussion, it was agreed to further consider whether degrees of identification or levels of assurance should be discussed in conjunction with functional equivalence provisions or provisions on a reliable method of identification. It was pointed out that provisions on functional equivalence, levels of assurance and mutual recognition formed the core of any future document. It was further stated that those provisions might need to be drafted taking into account various contexts, including the need for regulatory compliance, party autonomy, non-discrimination between online and offline means of identification and cross-border recognition of online identification.

82. Recognizing that the discussion of functional equivalence provisions on IdM could benefit from reference to cases where IdM was used, the Working Group heard examples when IdM was required in the business-to-business context, in particular for regulatory compliance (e.g. KYC), to establish the validity of a commercial document and to comply with contractual obligations. Concern was expressed that most examples provided did not refer to business-to-business transactions and that those that did refer to those transactions addressed issues of regulatory compliance or operation in highly-regulated sectors such as financial services. Doubts were in particular expressed that the KYC example was useful to IdM in the business-to-business context since KYC requirements, including identification of the customer, pursued specific goals related to the fight against terrorism financing, money-laundering and corruption.

83. A question was asked with respect to the entities relevant for the work of the Working Group (see A/CN.9/WG.IV/WP.153, para. 12). Support was expressed for the view that the work should focus on business-to-business relations and aim at facilitating trust in the identity of business partners. It was explained that transactions with public entities involved in trade (e.g. in the context of paperless trade facilitation) would also be relevant.

84. It was recalled that commercial transactions might fall under the scope of application of regulations containing an obligation to identify. In that respect, it was noted that regulatory requirements were likely to have an impact on the development of business practices. It was added that a future work product on IdM by the Working Group was unlikely to be significantly relevant in highly-regulated sectors.

85. It was recognized that IdM systems established in contexts other than business-to-business might be relevant to commercial partners and should therefore be taken into account in the work by the Working Group on IdM. It was reiterated that the primary focus of the Working Group should nevertheless be IdM in business-to-business transactions.

E. Consideration of a draft instrument and a road map contained in the proposal by Germany (A/CN.9/WG.IV/WP.155 and Add.1)

86. The Working Group heard an introduction of the proposal contained in documents A/CN.9/WG.IV/WP.155 and Add.1, which highlighted its main elements and the objectives pursued. Appreciation was expressed for the introduction and the comprehensive approach taken in the documents. The documents were found helpful for further discussion.

87. Clarifications were sought with respect to some provisions contained in the documents that did not appear applicable to business-to-business transactions, such as examples of primary identification in draft article 2 and reference to website authentication in draft article 19. A query was also raised whether business expressed any interest in establishing and supporting the functioning of the Coordinating Council referred to in draft article 5, the understanding being that such Coordinating Council might be established by non-State as well as State actors.

88. Concern was expressed with respect to draft provisions that deferred legislative functions to the Coordinating Council, including on matters raising public policy considerations. A view was expressed that States were often reluctant to delegate formulation of legal rules on such matters to a privately-run body. A query was also raised on whether the mechanism envisaged in document A/CN.9/WG.IV/WP.155 was to apply in the domestic or cross-border context or both.

89. In response, it was clarified that primary identification was typically used for establishing a legal entity and that website certificates were used in the business-to-business context, in particular in the subcontracting chain. As regards the Coordinating Council, it was clarified that such body could be publicly or privately run. An example of a body established in one jurisdiction with significant international outreach was provided. It was acknowledged that the involvement of States in the Council or in validating and enforcing its work would be essential. Ways to achieve that, it was noted, could be different, ranging from an international agreement to incorporating the code of conduct prepared by the Council in domestic legislation or providing incentives for its use.

F. Definitions

90. It was noted that the definition of "identity" contained in paragraph 17 of document A/CN.9/WG.IV/WP.153 might need to be amended in light of the earlier discussion of the Working Group on objects (see paras. 11–12 above). A question was raised whether that definition, unlike the definition of "identification", was necessary

or it should be deferred to national law. In response, it was stated that the definition of "identity" was useful as well.

91. With respect to the definition of "identity management" contained in paragraph 19 of the same document, concern was expressed that, as drafted, it might indicate that the cumulative reference to identification, authentication and authorization was necessary to define that concept whereas any of those listed elements would be sufficient. It was stated that the definition of "electronic identification" found in document A/CN.9/WG.IV/WP.144 was preferred.

92. A question was raised about the meaning of the word "environment" in the definition of "identity system" contained in paragraph 20 of document A/CN.9/WG.IV/WP.153. It was indicated that the definition of "electronic identification scheme" found in document A/CN.9/WG.IV/WP.144 was preferred.

93. With reference to the definition of "levels of assurance", it was suggested that the draft provisions in paragraphs 23 and 24 of document A/CN.9/WG.IV/WP.153 could be merged or a revised definition of that term could be built on paragraph 23. Another view was that there was no need for the definition of that term.

94. Views differed on whether work on legal recognition of IdM should refer to IdM processes, outcomes of those processes or both. The view was expressed that distinguishing between trust services and IdM would be necessary: in case of trust services, recognition would be sought for the outcomes while in the IdM context, recognition would be sought for processes. It was therefore suggested that at the initial stage work should focus on recognition of IdM processes and that it could be later decided to deal with recognition of individual IdM transactions. Some support was expressed for the view that work on recognition of IdM processes should proceed separately from work on recognition of outcomes of trust services.

95. The other view was that it would be inappropriate to separate the recognition of outcomes from the recognition of processes. It was recalled that IdM systems already existed but the absence of knowledge about the quality of the processes underlying them prevented the widespread recognition across borders of the outcomes of those systems.

96. Another view was that focus of work should only be on the recognition of outcomes of IdM processes. A further view was that, while focus of work should indeed be on establishing the equivalence of outcomes, the need for assurance of adequate processes should not be discarded.

97. Another view was that in practice it would be unrealistic to seek recognition of each outcome of IdM processes and trust services. It was therefore suggested that work should focus on the evidence-based recognition of processes (i.e., sets of rules), which might in turn lead to the automatic recognition of all outcomes of the recognized processes, thus dispensing with the need to seek recognition of each single outcome.

98. The prevailing view was that the Working Group should focus on recognition of processes and outcomes in the context of both IdM systems and trust services. It was considered essential to link that discussion with the discussion of approaches to legal recognition (see section B above).

99. Concern was expressed that definitions were being discussed by the Working Group before agreement had been reached on some essential substantive points. One view was that the definitions compiled in document A/CN.9/WG.IV/WP.150 were useful and sufficient at the current stage of deliberations. Another view was that definitions in documents A/CN.9/WG.IV/WP.144 and A/CN.9/WG.IV/WP.155 should be used instead of, or in combination with, the terms defined in documents A/CN.9/WG.IV/WP.150 and A/CN.9/WG.IV/WP.153.

100. The prevailing view was that the common understanding of essential terms for the work on IdM and trust services should be achieved at the earlier stage and a list of definitions would therefore be helpful. Accordingly, the Secretariat was requested

to include the definitions found in document A/CN.9/WG.IV/WP.144 in the list of essential definitions for future reference. It was also requested to cross-refer in that list to document A/CN.9/WG.IV/WP.150 and to the definitions in document A/CN.9/WG.IV/WP.155. It was further requested to clarify the origin of the definitions and the extent of their consideration by the Working Group. The understanding was that definitions so consolidated would be preliminary and would be amended as the work progressed. A view was expressed that the Working Group should decide soon on the form of a legal text to be prepared in order to facilitate progress of work, among others, on definitions and to avoid repetitive discussions.

G. Trust services

101. The view was reiterated that reference should be made to "trusted service" to avoid any ambiguity with respect to the well-settled legal notion of "trust" (see para. 14 above).

102. The view was expressed that little evidence existed on the need to create cross-border mechanisms for the recognition of trust services, which were usually subject to contractual agreements. It was indicated that the work of the Working Group should be limited accordingly.

103. The view was also expressed that the trust services market clearly pointed at the need to provide a higher level of legal certainty on the cross-border use of trust services. It was added that work in the field of trust services was therefore of great importance and should be conducted in parallel with the work on IdM.

104. It was suggested that an open-ended list of trust services should be compiled based on a common definition of "trust service". It was further suggested that the definition of "trust service" contained in document A/CN.9/WG.IV/WP.144 should be used as a working hypothesis for future deliberations.

105. It was indicated that the trust services listed in document A/CN.9/WG.IV/WP.154 on the basis of existing legislation were: electronic signatures; electronic seals; electronic timestamps; electronic registered delivery services; website authentication; and electronic archiving. It was suggested that electronic escrow services could be added to that list. The suggestion was also made to add blockchain services to that list. In response, it was indicated that blockchain was a technology and not a service.

106. It was explained that the notion of levels of assurance should not be used with respect to trust services, since electronic identification means offering a high level of assurance could be used for trust services with different levels of reliability.

H. Other general principles

107. The importance of the principle of non-discrimination against the use of electronic means was stressed. It was noted that the draft provisions contained in paragraph 26 of document A/CN.9/WG.IV/WP.153 posed challenges by referring to verification of identity with respect to both IdM and trust services. It was suggested that those provisions should be redrafted to avoid any confusion or that two different provisions, respectively for IdM and for trust services, should be drafted.

108. It was suggested that any reference to an element of the process in the draft provisions on non-discrimination should be replaced with references to the outcome of that process. In that respect, it was suggested that the provisions relating to IdM should refer to "results of the verification of identity" and that the provisions relating to trust services should refer to "results of the application of trust services".

109. With respect to the drafting suggestions on party autonomy and the accompanying commentary, the following changes were proposed: (a) to amend the draft provisions contained in paragraph 42 of document A/CN.9/WG.IV/WP.153 to

reflect discussions in the Working Group as regards the scope of work (persons or objects; see paras. 11–12 above); (b) to replace the words "person controlling" in paragraph 44 of that document with the words "person legally responsible" on the understanding that the controller might not be the person legally responsible for the object; and (c) to identify core rules that parties might not vary or derogate from in order to increase certainty and predictability of cross-border recognition of IdM and trust services.

110. With reference to a drafting suggestion on the principle of no new obligation to identify, a point was made that a close link existed between that provision and the principle of party autonomy. It was explained that the principle of no new obligation to identify was broader than the principle of party autonomy since it also conveyed that no amendments to substantive law were intended. At the same time, it was noted that new obligations to identify might arise because of the use of a particular trust service but, in any case, the use of that trust service should take place on a voluntary basis (see also para. 22 above).

111. The importance of the work on IdM and trust services for enabling the production of evidence across borders was highlighted. It was also stressed that contractual agreements were subject to mandatory law.

I. Certification of IdM and trust service providers

112. The view was expressed that in the business-to-business context, it would be appropriate to offer all certification options, which included: no certification; self-certification; certification by an independent third party; certification by an accredited independent third party; and certification by a State body. It was explained that business partners should be able to choose the option most appropriate for their needs, recognizing that each option would produce different legal effects. It was further explained that a possible architecture for such voluntary certification would not necessarily involve public entities but might rely on independent certification.

113. A question was raised on how the results of such third-party certification would be recognized across borders other than by enforcing a contractual clause. In response, the International Accreditation Forum was identified as an example of a body that facilitated recognition of certificates.

114. Concern was expressed that any solution presupposing a central certification, accreditation or oversight body might not be appropriate in situations where distributed ledger technology was involved in IdM and trust services because of challenges in identifying the body able to request the certification and the body to assess, among others. It was noted that the liability regime in those situations was also unclear.

115. A view was expressed that provisions on certification should not place an excessive burden on IdM service providers. In addition, it was stated that the State oversight over activities of private sector certifying bodies was essential to prevent risks to competition and abuse, in particular with respect to small market players. It was observed that accreditation of certifying bodies with State authorities aimed at ensuring independence, impartiality and fairness. In that respect, it was suggested that independent authorities might be in a better position to achieve those goals.

J. Liability

116. It was explained that the issue of liability could be dealt with in different manners depending on the scope of work. On the one hand, if the goal was to facilitate cross-border recognition of IdM and trust services, it would be necessary to determine the applicable law. On the other hand, if the goal was to provide guidance at the national level, for instance in the form of a model law, a discussion on liability allocation could be necessary, bearing in mind that the parties themselves could agree

on allocation of liability. In the latter case, it was added, a discussion of limitation of liability could also be necessary.

117. It was indicated that, as a general principle, service providers should be held liable for the services they provided. It was added that that general principle should apply to both IdM service providers and trust service providers. It was explained that higher quality services were provided at a higher cost, and that for that reason it could be possible to presume the intention or negligence of providers of those services in case of damage arising from the use of their services.

118. Recalling that the work of the Working Group focused on transactional identity, a question was raised with respect to possible liability of public entities. It was explained that public entities might be held liable as supervisory authorities and as service providers. It was added that the question of their liability might also arise when transactional identity credentials issued by private service providers relied on foundational identity credentials provided by public authorities.

K. Institutional cooperation mechanisms

119. The role of institutional cooperation mechanisms in achieving mutual legal recognition and interoperability of IdM systems and trust services was noted. It was also noted that there might be different forms of such mechanisms, which could be of a private or public nature. The view was expressed that in any scenario of such institutional cooperation, objective criteria and a mechanism for verification of compliance with those criteria would be necessary. It was added that any decision on institutional cooperation mechanisms should take into account the views of the private sector.

120. With respect to paragraph 39 of document A/CN.9/WG.IV/WP.154, the suggestion was made that reference to the common technical framework should be replaced with reference to interoperability not to jeopardize the principle of technology neutrality. The views were expressed that harmonization of legal rules and both contractual and legislative frameworks contributed to the establishment of the common legal framework.

L. Transparency

121. It was stated that transparency should be understood in terms of clarity and disclosure of terms and conditions of services, code of conduct by service providers (i.e., their operational policies) and assessment reports. It was explained that disclosure might be to subscribers, the general public or supervising authorities, as appropriate, subject to protection of any confidential information.

122. It was said that transparency of terms and conditions of services was important to allow subscribers to make an informed choice among competing market offers. It was added that it was also considered important for competitors, for example in evaluating their offers against those of other market players, and for other stakeholders, for instance to monitor competition in the market.

123. It was noted that another aspect of transparency pertained to notification of security breaches, which could impact not only systems but also transactions. It was explained that a proper security breach notification mechanism was considered important for improving performance and increasing the level of confidence.

124. It was noted that a number of regulations, including on data protection, would be applicable in the transparency context.

M. Data retention

125. The view was reiterated that privacy and data retention were important topics but that they fell outside the scope of the mandate received by the Working Group. It was indicated that the outcome of the work of the Working Group should not attempt to modify existing law in those or other fields.

126. The importance of electronic archiving services for business was noted. It was explained that electronic archiving pursued the specific function of providing legal certainty on the validity of archived electronic records in case of dispute and for other needs. It was suggested that the legal recognition mechanism for electronic archiving could be limited to ensuring compliance with the legal requirements of the jurisdiction where the archived records needed to be used.

N. Supervision of service providers

127. There was agreement that the discussion of supervision aspects should be held together with that of certification (see section I above). It was recognized that, while many aspects would be common for both certification and supervision, differences existed and should be reflected in terminology and provisions addressing those two subjects. One distinct feature of supervision was considered to be the need for taking corrective and enforcement actions in case of non-compliance with mandatory requirements.

128. The view was reiterated that the role of State supervising authorities as the only bodies that could ensure stability and proper supervision should not be underestimated. The difference between supervision and control, including self-control and control by other market players and subscribers of services, was highlighted. It was also noted that the role of State authorities was growing not only in supervision but also in development and deployment of IdM systems and in the provision of IdM and trust services, which would necessitate separating those functions of public authorities. It was considered premature to reach a conclusion on whether any particular model of supervision, public or private (contractual), would be necessary.

129. The difficulty of supervising distributed ledger technology was mentioned since, for instance, there could be no central provider to supervise. It was also noted that taking corrective and enforcement actions in those situations would be problematic, including by introducing changes in a public blockchain system through a "hard fork" or otherwise.

O. Decisions of the Working Group under agenda item 4

130. The view was expressed that future documents prepared by the Secretariat should contain additional draft provisions on core issues in order to further facilitate progress. It was added that those draft provisions should refer to the various possible options, rely on existing legislative texts and proposals submitted by States and International Organisations to the Working Group, and be prepared with the assistance of experts.

131. The view was also expressed that future documents should focus on identifying core questions useful to fully understand the scope of the project and provide analysis and research needed to make informed choices.

132. It was noted that the two suggested approaches were compatible and that both were useful. It was recalled that a firm timeline for submission of documents applied, which might not allow for carrying out broad intersessional expert consultations.

133. The Working Group asked the Secretariat to prepare documents for its fifty-eighth session on the basis of the existing ones, by drafting new provisions on

core issues as well as identifying and illustrating key questions for the Working Group and bearing in mind the applicable time frame.

V. Technical assistance and coordination

134. The Working Group heard an oral report by the Secretariat on technical assistance and cooperation activities undertaken since the oral report by the Secretariat at the previous session of the Working Group. Reference was made, in particular, to treaty actions with respect to the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 23 November 2005)[2] and activities of the Secretariat on the promotion of UNCITRAL electronic commerce texts, including in cooperation with other bodies, such as the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) and the United Nations Conference on Trade and Development (UNCTAD). Reference was made to the work carried out by the Secretariat on illustrating the interaction between UNCITRAL texts, on the one hand, and relevant provisions of free trade agreements, on the other hand.

135. The Working Group was also informed about past and upcoming electronic commerce-related events organized or attended by the Secretariat in furtherance of the mandate received from the Commission to compile information on legal issues related to the digital economy.[3] An invitation was extended to States and other organizations to participate in or otherwise contribute to those activities.

136. Appreciation was expressed for the information provided and the activities undertaken by the Secretariat on technical assistance and cooperation in the area of electronic commerce law. It was noted that, besides preparation of legal texts, activities aimed at promoting broader adoption, understanding and use of those texts as well as coordination were essential to ensure the achievement of UNCITRAL's mandate.

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[2] United Nations, *Treaty Series*, vol. 2898, No. 50525.

[3] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 253(b).